FILED
DEC 22 1956
JOHN T. FEY, Clerk

No. 648

In the Supreme Court of the United States

October Term, 1956.

THE YUCHI (EUCHEE) TRIBE OF INDIANS, and S. W. BROWN, LEGUS BROWN, WILLIE TIGER, FRED SKEETER and JESSE JAMES, members of said Tribe, Band or Group of Indians, for themselves and all other members of said Tribe, Band or Group of Indians,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, *Respondent,*

Consolidated below with Docket No. 21:

THE CREEK NATION OF OKLAHOMA, *Respondent,*

vs.

THE UNITED STATES OF AMERICA, *Respondent,*

Interpleader in Docket No. 21,

CREEK NATION EAST, *Respondent.*

PETITION for WRIT of CERTIORARI

To the United States Court of Claims.

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222 Berryhill Building,
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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1956.

No. .....

THE YUCHI (EUCHEE) TRIBE OF INDIANS, and S. W. BROWN, LEGUS BROWN, WILLIE TIGER, FRED SKEETER and JESSE JAMES, members of said Tribe, Band or Group of Indians, for themselves and all other members of said Tribe, Band or Group of Indians,

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On Petition for Writ of Certiorari to the United States Court of Claims.

PETITION FOR WRIT OF *CERTIORARI.*

To the Honorable The Supreme Court of the United States of America:

Petitioners respectfully petition this Honorable Court to grant a Writ of Certiorari to the United States Court of Claims in the above cause.

(a) The following referenced opinions were delivered in the courts below:

In the Indian Claims Commission:

June 5, 1951, Docket No. 21, Vol. 1, Ind. Cl. Comm. 546-552, S. Appendix at pages 44-48;

April 22, 1952, Docket No. 21, Vol. 2, Ind. Cl. Comm. 66, S. Appendix at pages 49-64;

May 5, 1955, Docket No. 21, Vol. 3, Ind. Cl. Comm. 445, S. Appendix at page 64-77;

May 16, 1955, Docket 172, Vol. 3, Ind. Cl. Comm. 515, S. Appendix, at pages 78-87.

In the United States Court of Claims:

May 6, 1952, 122 Ct. Cls. 380; S. Appendix at pages 87-104.

October 2, 1956, not yet reported; appended hereto as Appendix "1."

(b) A concise statement of the grounds on which jurisdiction of this Court is invoked showing:

(1) The opinion, sought to be reviewed, is thought to conflict on important questions of Federal law and with the decisions of this Court.

(2) Departure of the opinion sought to be reviewed from the accepted and usual course of judicial procedure and sanction of such a departure by the lower court.

(i) The date of the opinion sought to be reviewed and entry thereof is October 2, 1956.

(ii) No order respecting a rehearing has been made and no order asking an extension of time within which to file a petition for *certiorari* has been filed.

(iii) The statutory provision conferring jurisdiction in this Court to review the opinion in question is 28

U. S. C., paragraph 1255, Section 20 (c) of the Indian Claims Act[1], which reads as follows:

> "Determination of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by Section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U. S. C. Sec. 288), as amended (now Section 1255 of Title 28, U. S. C.)
>
> "Cases in the Court of Claims may be reviewed by the following methods:
>
> "(1) By writ of certiorari granted on petition of * * * the claimants."
>
> —Act of June 25, 1848, c. 646, 62 Stat. 928.

Questions Presented.

1. In the opinion sought to be reviewed, the United States Court of Claims has decided a Federal question in a way in conflict with the applicable decisions of this Court. The title to lands taken by the United States, by the Treaty of August 9, 1814, was fixed by treaty grant by the Treaties of 1790 and 1796. The question of ownership of the lands taken in 1814, as a matter of law, depends on the interpretation of these treaties. The interpretation of these treaties by the Court of Claims, which determined ownership, is in conflict with the opinions of this Court. This Court defines the elements necessary to constitute an Indian Nation. The Court of Claims fails to recognize such definition.

2. In the opinion sought to be reviewed, the Court of Claims has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such

1. Act of August 13, 1946, 60 Stat. 1049; 25 U. S. C., Sec. 70.

departure by the Indian Claims Commission as to call for an exercise of this Court's power of supervision.

a. The Commission consolidated Docket No. 172 and Docket No. 21 without jurisdiction, as disclosed by their pleadings.

b. The opinion sought to be reviewed and the *McGhee* opinion hold that the owners of the claims, growing out of the Treaty of August 9, 1814, were the descendants of members of the Creek Nation as it was constituted August 9, 1814. This holding is not within the scope of the pleadings of respondents, the Creek Nation of Oklahoma, and the Creek Nation East, Docket No. 21.

c. Since the Court of Claims affirmed the decision of the Commission, holding that the petitioners herein were not entitled to present their claim with counsel of their own choosing, a departure from accepted judicial procedure was sanctioned. This holding sanctioned fraud, sanctioned lack of jurisdiction over the petitioners in Docket No. 21, and sanctioned conflict of interest between the two claims.

The Constitutional provisions, treaties, statutes, ordinances and regulations which the case involves are:

Constitutional provisions:

Article 6;

Fifth Amendment.

Treaty of

August 7, 1790 (7 Stat. 35); S. Appendix, pp. 1-8.

August 29, 1796 (7 Stat. 56); S. Appendix, pp. 8-17.

June 16, 1802 (7 Stat. 68); S. Appendix, pp. 17-21.

August 9, 1814 (7 Stat. 120); S. Appendix, pp. 22-27.

June 14, 1866 (14 Stat. 785); S. Appendix, pp. 28-29.

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Section 4 of Act of July 22, 1790 (1 Stat. 137); S. Appendix, p. 30.

Section 8 of Act of March 1, 1793 (1 Stat. 329, 330); S. Appendix, pp. 30-31.

Act of March 1, 1901 (31 Stat. 1447); S. Appendix, p. 31.

Section 28, Act of April 26, 1906 (34 Stat. 137); S. Appendix, pp. 31-32.

August 13, 1946 (60 Stat. 1049, 25 U. S. C. Sec. 70); S. Appendix, pp. 32-43.

Statement of the Case.

The basis for Federal jurisdiction of the Commission to hear and determine the claim of petitioners is Sections 2 and 10 of the Indian Claims Act.

Petitioners claim: That August 9, 1814, their ancestors, members of the Yuchi Tribe of that date, owned in equal moieties all the communal title to the lands for which they seek an award.

The Court of Claims in their opinion admit: That on such date the members of the Yuchi Tribe of 1814 owned a communal interest in the lands for which petitioners seek an award. The Court holds that all the members of a so-called Creek Nation, including the ancestors of petitioners, owned in equal moieties the communal title to all the lands taken by the Fort Jackson Treaty. The conflict of interest in the two claims will hereinafter appear.

Respondent, the Creek Nation of Oklahoma, Docket No. 21, was created under the provisions of Articles 2 and 10 of the treaty of June 14, 1866 (14 Stat. 785) by the amalgamation of 44 Indian tribes and many persons of African

descent. Its former reservation in Oklahoma was provided to be allotted in kind by Section 11 of the Act of June 28, 1898. Its Indian members were made citizens of the United States by the Act of March 1, 1901. All governmental powers and authority or control of its members was taken from it by Section 28 of the Act of April 26, 1906. Its acts are now subject to the approval of the President of the United States.

Respondent the Creek Nation East, Docket No. 21, was recently created, from claimed descendants of ancestors claimed to be members, August 9, 1814, of a so-called Creek Nation.

Respondent, the United States, is the party against which awards under, the Indian Claims Acts, are sought.

Petitioners, Docket No. 172, is a tribe, band or other identifiable group of American Indians, domiciled in Oklahoma, whose identity as an identifiable group is preserved by being given separate representation under Section 10 of the treaty of June 14, 1866, in the Creek Nation of Okla-

January 29, 1948, Respondent, the Creek Nation of Oklahoma filed a Petition, Docket No. 21, in the Indian Claims Commission. It sought an award under Section 2, clause 5 (lack of fair and honorable dealing) of the Claims Act to the Petitioner, for an injury alleged to have been received by a so-called Creek Nation by the treaty of August 9, 1814. Petitioners respectfully state that the Petition shows on its face (a) that the Commission does not have jurisdiction to hear and determine the suit, and (b) that the Creek Nation of Oklahoma is not the real party in interest.

April 4, 1951, Respondent, the Creek Nation East, filed an amended Motion and Petition for leave to interplea, Docket No. 21. It alleged it was a group of American Indians whose ancestors August 9, 1814, were members of a so-called Creek Nation. It sought to participate in any award to the Creek Nation. Its motion was denied June 4, 1951, and appeal was taken to the Court of Claims.

Respondent the United States is the party against which all the parties seek an award.

July 27, 1951, Petitioners filed their petition, Docket No. 172 under Section 2 of the Claims Act. They seek an award with interest for lands taken without their consent or consideration under threats to use force by the United States August 9, 1814. Also an award with interest for the taking by the United States without their consent or consideration from their ancestors by the treaty of October 17, 1802 (7 Stat. 73).

April 22, 1952, the Commission delivered an opinion granting an interlocutory award to the Creek Nation of Oklahoma.

May 6, 1952, the Court of Claims delivered an opinion, 122 Ct. Cl. 380, cert. denied 73 S. Ct. 91, in effect that the Creek Nation East was entitled to interplea if it established the allegations of its pleading that the ancestors August 9, 1814, were members of the Creek Nation.

May 5, 1955, a hearing was had on the issues of liability of the United States under the Treaty of Ghent.

April 13, 1955, a hearing was had Docket No. 172, on the claim of Petitioners. The Commission dismissed the claim of the Yuchi and appeal was timely taken to the Court of Claims, which October 2, 1956, affirmed the judgment of the Commission.

ARGUMENT.

I.

Petitioners assert that August 9, 1814, their ancestors owned the lands by treaty grant for which they seek an award under Section 2 of the Indian Claims Act; that the United States by the above referenced treaty tortiously took the above mentioned lands from their ancestors.

The Court of Claims, in the opinion sought to be reviewed, held that the lands for which Petitioners seek an award was included in a larger tract, at such date, owned by a Creek Nation composed of Upper, Middle, and Lower Creeks and Seminoles; that the ancestors of Petitioners were included in the members of such Creek Nation; that an award, if any, would be distributed to all the members of such Creek Nation as it was constituted August 9, 1814. In other words, if Petitioners prevail, they will participate in equal moieties in the lands their ancestors owned August 9, 1814. If Respondents prevail, Petitioners will participate in equal moieties with all members of the larger group in the larger tract.

The United States acquired a Title of Discovery to the lands of interest from England. Indian tribes were recognized to have the right of occupancy and use of lands they used and occupied at the period of discovery, until that right was extinguished. By common law, Indians could not sell their right in lands, without the consent of the United States. The common law was amplified of Section 4 of the Act of July 22, 1790.[2] It was further amplified by Section 8 of the Act of 1793.[3] Any Indian treaty purporting on

2. 1 Stat. 137.

3. 1 Stat. 329-330.

its face to be executed with authority, when adopted, by the Sixth Article of the Constitution became the law of the land. Under its plenary power, the United States could take any Indian lands, however held, in any manner it chose. This power was subject to limitations inherent in its guardianship over them and pertinent constitutional limitations. Indian tribes could not sue to protect their rights or for wrongs done them without a special jurisdictional Act. In the interpretation of Indian treaties, Acts of Congress, and other documents doubtful questions are resolved in favor of the Indians.

The opinion sought to be reviewed is in conflict with the following opinions of this Court.

Montoya v. *United States* defines the elements necessary to constitute an Indian Nation, as follows:[4]

> "The North American Indians do not and never have constituted 'nations' as that word is used by writers upon international law, although in a great number of treaties they are designated as 'nations' as well as tribes. Indeed, in negotiating with the Indians the terms 'nation,' 'tribe' and 'band' are used almost interchangeably. The word 'nation' as ordinarily used presupposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries and the power to enter into negotiations with other nations. These characteristics the Indians have possessed only in a limited degree, and when used in connection with the Indians, especially in their original state, *we must apply the word 'nation' a definition which indicates little more than a large tribe or a group of affiliated tribes possession a common government, language or racial origin, and acting for the*

4. 180 U. S. 261, 265.

time being, in concert. Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word. As they had no established laws, no recognized method of choosing their sovereigns by inheritance or election, no officers with defined powers, their governments in their original state were nothing more than a temporary submission to an intel tual or physical superior, who in some cases ruled with absolute authority, and in others, was recognized only so long as he was able to dominate the tribe by the qualities which originally enabled him to secure their leadership. *In short, the word 'nation' as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment."*

In *Squires* v. *Capoeman*,[5] the rule to be observed in the interpretation of Indian treaties, is stated as follows:

"Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall, 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.' *Worcester* v. *The State of Georgia*, 6 Pet. 515, 582."

In *Montoya* v. *United States*, 32 C. Cls. 349, affirmed 180 U. S. 261, appears the following:

"* * * The chief executive or responsible head of

5. ..... U. S. ....., 100 L. Ed. (Advance 447).

the organization, whatever its character, was the one whose signature was sought in making treaties."

Of interest is an opinion by the Solicitor for the Department of Indian Affairs, an excerpt from which reads, as follows:[6]

"For the information of the Solicitor's Office an anthropological report, compiled by Mr. Morris Opler, was submitted which deals with the history and present character of these towns. This report provides data and opinions of authorities on the Creeks showing that the Creeks were originally a confederacy composed of a number of tribes, each referred to as a 'Talwa.' This word was generally translated into the English word 'town' but rather covers the conception contained in the word 'tribe.' Each Talwa was self-governing. It was composed of people living in a single locality, but membership was dependent on birth rather than residence since a Creek Indian belonged to the Talwa of his mother. These towns were originally recognized by the Federal Government as the governing units in the Creek confederacy. The treaties of 1790 and 1796 with the Creeks were signed by the representatives of the various towns. However, because of the pressure of the white people for land and the fact that the towns declared war and peace independently of each other, the Federal authorities found it advisable to insist upon centralization of the Creeks to avoid dealing with each Talwa. The Indians opposed this centralization and it was not until after the Civil War, in which the towns took opposing positions, that the Federal Government achieved the formation of a single government among the Creek Indians. And even then the union was opposed by the full-blood element. In spite of the centralization, however, the towns were still used for the official purposes of census and annuity payments and

6. Cohens Hand Book Federal Indian Law, p. 271.

as a basis for representation in the central body. The census was kept on the basis of these towns until the making of the allotment rolls by the Dawes Commission. It was thought that the allotting of the Creek Indians would destroy their town organization but this did not in fact occur as the members of the town took allotments in the same locality and continued their social and political organization. The report states that at the present time the same offices described by members of De Soto's expedition are still maintained. Many of the old traditions and distinctions between the towns are likewise maintained, including the matrilineal membership. * * *"

The words "Creek Nation," "Creek Confederacy," "Creek Lands," "Creek Indians," "Creek" and "Creeks" are all words having a general meaning. In each instance to determine the meaning intended reference must be made to the context. If not supplied by the context then reference must be had to other evidence.

The words "Creek Nation," as used in the Treaties of 1790,[7] 1796[8] and 1814,[9] standing alone, might be construed to refer to the geographical location of 47 small independent Indian tribes, or to a loose war confederacy between 47 small independent Indian tribes or as a compliment and flattery to the Indians assembled.

The interpretation in the opinion sought to be reviewed (that of the three Respondents) is that the Kings, Chiefs and Warriors of each tribe also occupied the same official position in either the Upper, Middle and Lower Creek, or Seminoles and also in a Creek Nation; that when the sev-

7. 7 Stat. 35; S. Appendix, pp. 1-8.
8. 7 Stat. 56; S. Appendix, pp. 8-17.
9. 7 Stat. 120; S. Appendix, pp. 22-27.

eral divisions met in joint council, the one official speaker of the division in the territory in which they met presided over the council and for the time being was head of a Creek Nation. This is an unusual interpretation of the definition of an Indian Nation as defined in *Montoya* v. *United States, supra,* and the rules of interpretation of Indian treaties expressed in *Squires* v. *United States, supra.*

The Contracting Parties in the Treaties of 1790 and 1796.

(*a*) Article I, Treaty of 1790, recites: "That there shall be perpetual peace and friendship between all the citizens of the United States and all the individual towns and tribes of the Upper, Middle and Lower Creeks and Seminoles composing the Creek Nation of Indians." This standing alone, recognizes the town as the contracting parties.

(*b*) Article II provides "That the undersigned kings, chiefs and warriors for themselves and all parts of the Creek Nation within the limits of the United States do acknowledge themselves and the said parts of the Creek Nation to be under the protection of the United States." This is an acknowledgment that the United States is their guardian.

(*c*) Article V provides that: "The United States solemnly guarantees to the Creek Nation all their lands within the United States westward and southward of the boundary described in the foregoing Article." The use of the plural "their" instead of the singular "it" indicated group of tribes rather than a single entity.

(*d*) The treaty was signed by certain kings, chiefs and warriors "on behalf of themselves and the whole Creek

Nation of Indians." The Indian signature appeared under the heading of the respective tribes, and the official position of each signatory was given. Had there been an existing entity called the Creek Nation its executive head and officials would have executed the treaty. The Treaty of 1790 was the first treaty the United States made with the tribes of interest. From the first treaty to and including that of 1866[10] no designated head or official of an entity was ever designated in their signature to a treaty.

In the case of *Tully* v. *United States,* (32 C. Cls. 1) appears the following:

> "The policy of the United States in dealing with the Indians has been, as we understand, to accept the subdivisions into such tribes or bands as the Indians themselves adopted."

Petitioners submit that when the treaty is interpreted under the opinion in *Montoya* v. *United States, supra,* and *Squires* v. *Capoeman, supra,* it appears the treaty was executed by separate independent tribes of Indians.

Treaty of 1796:

This treaty was signed by 35 of the 47 tribes. Its execution followed the same pattern as that of the Treaty of 1790 and in general provided the same terms. Article I made all the provisions of the Treaty of 1790 binding on the contracting parties unless otherwise provided. If changes of use and occupancy of the land had been made, it was taken care of in Article I, as the United States had plenary power to take lands from one tribe and give them to another tribe. In case of conflict, the later treaty would control.

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10. 14 Stat. 785; S. Appendix, pp. 28-29.

The words "solemnly guarantee," as used in the treaties, are not the technical words used by the Whites to grant lands, but have the same meaning, expressed in language more easily understood by illiterate Indians.

Treaty of 1814:

Although its execution was procured under threats to use force, it became the law of the land on adoption. No change had been made in ownership of the lands taken by the Fort Jackson Treaty since the Treaties of 1790 and 1796 were adopted. Nor could any changes have been made without the consent of the United States. No recognition of political status, or ownership of the lands, contained in the Treaty of 1814, could affect petitioner's claim for the taking. Petitioners' claim herein is not one to repossess the land. It is for an award for the tortious taking of the land which they owned prior to the taking.

II.

In the opinion sought to be reviewed the Court of Claims has so departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the Indian Claims Commission, as to call for an exercise of this Court's power of supervision. Examples are given below.

Excerpts[11] from the Indian Claims Act are as follows:

> "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska. * * * "

11. 60 Stat. 1049; S. Appendix, pp. 32-43.

Section 10 of the Act reads as follows:

> "Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion or laches on the part of such organization be shown to the satisfaction of the Commission."

2a. Section 2 of the Act makes no provision for suits on behalf of American Indians amalgamated with many persons of another race. Congress has frequently recognized[12] a group as an entity entitled to bring a suit for an injury to it that accrued prior to amalgamation. The Creek Nation of Oklahoma is an amalgamation by the Treaty of 1866[13] of Indian tribes and persons of another race. Its Indian members were made citizens of the United States by the Act of March 3, 1901.[14] It appears highly improbable that Congress intended to confer authority on the Creek Nation of Oklahoma, which since the adoption of Section 28 of the Act of 1906[15] has had no more authority over its members than their church or lodge, to have exclusive authority to represent petitioners.

2b. The Creek Nation of Oklahoma came into existence by the treaty of 1866. It could not have been a treaty party to the treaty of 1814, which is the basis of the claim urged.

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12. United States v. Old Settlers, 148 U. S. 427; Delaware Indians v. United States, 193 U. S. 127.
13. S. Appendix, pp. 28-29.
14. S. Appendix, p. 31.
15. S. Appendix, pp. 31-32.

Its petition (R.) clearly shows that it is not the real party in interest.

2c. The pleadings (R.) of the Creek Nation East only seek to participate in any award made to the Creek Nation of Oklahoma. If, as asserted above by Petitioners, the Commission does not have jurisdiction to hear and determine the Petition of the Creek Nation of Oklahoma, its claim must fail.

(2c-1) The Creek Nation East has offered no proof that it is an identifiable group of American Indians. It is a legal impossibility, as disclosed by its pleadings (R.) that it can present proof of its identity as an identifiable group, since its members have not been organized as a group, or been recognized by Congress for more than 100 years.

2d. The Petitioners sued under Section 2 of the Claims Act for the tortious taking of lands that their ancestors owned August 9, 1814. Respondent, the Creek Nation of Oklahoma, sued for a larger tract which includes the lands claimed by the Petitioner under Section 2, Clause 5 of the Claims Act (Lack of Fair and Honorable Dealing). The Petitioners sued for just compensation. The Respondents sued for value at the time taken. The Respondent thus dilutes the amount of an award, if any, for Petitioner's land about seven-eighths. This creates a great difference in the nature of the two claims.

Approval by the Court of Claims in the opinion sought to be reviewed of an Interlocutory Judgment[16] entered by the Commission April 22, 1952, Docket No. 21, to the Creek Nation of Oklahoma (apparently by acquiescence and agreement of counsel), for lands taken from the tribes of the

16. S. Appendix, pp. 49-64.

Lower Creeks. Value was fixed, without evidence, at 20 cents per acre. The Interlocutory Judgment provided that such award be distributed to all the descendants of the Creek Nation as it was constituted August 9, 1814. Under Article I of the Treaty of August 7, 1790, the Creek Nation was composed of the Upper, Middle, and Lower Creeks and Seminoles. The proposed division of the award would further dilute the amount each recipient received to almost the vanishing point.

It is Hornbook law that one organization and one lawyer cannot represent conflicting interests, and that an attempt to do so involves at least constructive fraud.

Wherefore, Petitioners respectfully pray that the Writ of *Certiorari* issue to review the opinion of the United States Court of Claims.

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APPENDIX 1.

IN THE UNITED STATES COURT OF CLAIMS.
Appeal Docket No. 5-55. (Decided October 2, 1956)

The Yuchi (Euchee) Tribe of Indians, et al.,
vs.
The United States and the Creek Nation.

The Creek Nation East, Interpleader.

Mr. Lewis M. Dabney, Jr., for appellants, Yuchi Tribe of Indians, et al. Messrs. J. T. Smith and Herbert S. French were on the briefs. Mr. Paul M. Niebell for the Creek Nation, appellee. Messrs. Charles Bragman and C. Lenoir Thompson for the Creek Nation East, Interpleader appellee. Messrs. Claude Pepper, Frank Horne and Hugh Rozelle were on the brief. Mr. Ralph A. Barney, with whom was Mr. Assistant Attorney General Perry W. Morton, for the United States, appellee.

On Appeal from the Indian Claims Commission.

LITTLETON, Judge, delivered the opinion of the court:

This is an appeal by the Yuchi (Euchee) Tribe of Indians, et al., from an order of the Indian Claims Commission dismissing the appellant's claim for recovery in their own right of the value of certain land ceded to the United States Government by the treaties of August 9, 1814, 7 Stat. 120, and June 16, 1802, 7 Stat. 68, for which they claim no compensation was paid. The Indian Claims Commission in their Docket No. 21 (consolidated with this claim, Docket No. 172, for purposes of trial) allowed recovery by the Creek Nation of Oklahoma of the value of part of the land claimed that was ceded in 1814. The award was for the benefit of all the descendants of the Creek Nation as it was constituted

in 1814 when the treaty of that year was made, and recognized by the United States in the treaty of cession of that year. Appellants being part of the Creek Nation as it was then constituted will share in the award to the Creek Nation.

The proceedings in the consolidated cases began on January 29, 1948, when the Creek Nation of Oklahoma, on behalf of descendants of the Creek Nation of 1814 now residing on the reservation in Oklahoma, filed its petition with the Commission to recover damages for the acquisition by the United States of 23,267,600 acres of Creek lands in Alabama and Georgia by the above-mentioned 1814 treaty, sometimes referred to as the Treaty of Fort Jackson. The claimant alleged that the lands were acquired without compensation and contrary to the Government's obligation under the Indian Claims Commission Act, 60 Stat. 1049, 25 U. S. C., Sec. 70, to deal fairly and honorably with the Indians. On January 5, 1951, the Creek Nation East moved for leave to intervene on behalf of descendants' of the Nation of 1814 living east of the Mississippi. This was denied by the Commission but their decision was reversed by this court, C. W. McGhee, et al., v. United States, 122 C. Cls. 380, and intervention was permitted on the ground that the injury alleged by the Creek Nation was in fact an injury to the entire Creek Nation as it was constituted in 1814, and the original claimant, The Creek Nation of Oklahoma, represented the interests of only those Creeks that resided as part of that nation in Oklahoma and did not represent the interests of Creeks otherwise situated. This court held, therefore, that any recovery should be in favor of all living descendants of the nation as it existed in 1814. Pursuant to this decision, an order allowing intervention was issued on December 21, 1953.

While action was pending in the McGhee case, supra, the Indian Claims Commission rendered an interlocutory judgment in favor of the original claimants on April 22, 1952, for the value of 8,849,940 acres of the original 23,267,600 acres claimed to have been improperly acquired by the United States. The transfer of the balance was found to

have been approved by the Indians at the time of the treaty. The Creek Nation v. United States, 2 Ind. Cl. Comm. 66.

On May 5, 1955, the Commission made additional findings and in accordance with the McGhee case decided that the award shall be for the benefit of all descendants of the Creek Nation as it was constituted in 1814 and recognized by the United States in the treaty of cession of that year. The Creek Nation v. United States, 3 Ind. Cl. Comm. 455. On December 29, 1955, further additional findings were made and the amount of land on which the award was to be based was increased from 8,849,900 acres to 8,986,653 acres, the actual dollar value of the award being withheld until a hearing on the value of the land as at 1814 could be had and a determination made. The Creek Nation v. United States, 4 Ind. Cl. Comm. 140.

The appellants, the Yuchi Tribe of Indians, petitioned the Indian Claims Commission, Docket No. 172, on July 27, 1951, for recovery of the value of 11,200,000 acres of land ceded to the United States by the Treaty of Fort Jackson as well as for part of a cession made to the United States by the treaty of 1802. This land included the above referred to 8,986,653 acres of the 1814 treaty occupied by the friendly Lower Creeks, including the Yuchi, for which the Creek Nation of Oklahoma had been awarded a recovery by the Commission.

It also included land in Alabama lying to the west of that tract, and land in Georgia lying to the east of it and extending to the Atlantic Ocean. On this appeal, the Yuchi have abandoned their claim to separate ownership of a large part of the land originally sued for. Their claim is now limited to that portion of the land granted to the United States by the Treaty of Fort Jackson in 1814, shown on Royce's Map of Indian Cessions as that part of Cession No. 75, which lies east of the Flint River in Georgia, and that tract of land ceded by the 1802 treaty and shown on Royce's Map as part of Cession No. 44, being that part of

Cession No. 44, which lies south of the Altamaha River and joins on the east the tract above mentioned.

On September 4, 1953, the Government moved to consolidate the two cases for trial on the ground that such was necessary to determine the question of ownership of the lands involved and to avoid multiple liability on the part of the United States. The motion was granted on December 21, 1953, and hearings were subsequently held which resulted in the above referred to findings of fact and opinion. Docket 172 in which the Yuchi Indians were the petitioners was dismissed by the Commission, it deciding that the Yuchi were, and still are, part of the Creek Nation; that the Yuchi never had any title to the lands in question; that the Creek Nation was the owner of the lands in 1814 and, therefore, the Yuchi had no cause of action in their own right. The Commission further held that since the Yuchi are descendants of members of the Creek Nation of 1814 and since any award for the lands ceded by the treaty of that year will inure to the benefit of all descendants of the nation as it was then constituted, the Yuchi Tribe will be protected by and be the beneficiaries of any award made in Docket No. 21. It is our opinion that in these conclusions the Commission was clearly right.

Pursuant to an agreement between the United States and the State of Georgia in 1802 whereby the United States promised to extinguish Indian title in Georgia as soon as possible, the United States entered into a treaty with the Creek Nation for a cession of a tract of land part of which is here put in question by the Yuchi. The treaty was sanctioned and approved by the Creek National Council and the Creeks were paid for the land ceded.

In about 1811, probably at the instance of the English who desired an alliance with the Indians in their forthcoming war with the United States, some of the Indians of the Creek Nation, contrary to the wishes of that nation, began terrorizing the whites and a civil war eventually erupted among the Creeks. After much prodding the United States

Government finally entered the fray on the side of the recognized Creek Nation and ultimately defeated the hostiles. General Andrew Jackson in command of the victorious armies commenced a treaty convention on August 1, 1814, armed with authority from the Secretary of War of the United States to exact indemnification for the hostilities above referred to by cessions of lands from the Indians for expenses incurred in the prosecution of the Indian war.

Under the threat of force, the general demanded from the 36 Creek Chiefs in attendance at the convention a huge tract of land in Alabama and Georgia all of which is represented by Royce's plat No. 75. Most of this land was that which was formerly occupied by the hostile group of Indians but a large part of the lower portion was occupied exclusively by the friendly Indians and was still governed by the Creek Nation. The fact that 35 of the chiefs present were friendly Creek Chiefs and only one was a hostile chief, and the fact that the Creek Nation, as such, was not at war with the United States but, rather, was an ally did not seem to bother General Jackson. The treaty as concluded ceded to the United States all of the land demanded by the United States. It was for this entire tract of land that the Creek Nation attempted to recover in their suit before the Indian Claims Commission. Claims for all that land that was formerly occupied by the hostile Creeks was denied because negotiations at the treaty conferences indicated that the friendly chiefs there present, that is, the representatives of the Creek Nation, felt that it was right for the Government of the United States to have that land as indemnification for expenses incurred in helping the loyal portion of the tribe. Since those friendly chiefs represented the wishes of the Creek Nation and since they in effect, agreed to give the land to the United States as payment for its aid, recovery was denied as to it. At the time of the treaty convention, the Indians protested formally and vigorously to General Jackson and to the Government of the United States the taking of the rest of the land but to no

avail. It is this protested portion of the cession which the Indian Claims Commission in Docket No. 21, consolidated with this Yuchi case, decided was taken from the Indians unjustly by the Treaty of Fort Jackson and that the Creek Nation should be paid for it, the award to be for the benefit of the descendants of all members of the Creek Nation as constituted in 1814. In our opinion the Commission was right in this conclusion.

Signers of the treaty on the part of the Creek Nation included a representative of the Yuchi Tribe. Their representative also signed the written protest then submitted.

The substance of the Yuchi claim on this appeal is (1) that they, not the Creek Nation, were the owners of that part of the land ceded to the United States by the treaty of 1814 that was east of the Flint River, and that part of the land ceded to the United States by the treaty of 1802 that was south of the Altamaha River; (2) that title to the lands was *granted* to them by the treaties of 1790, 7 Stat. 35, and 1796, 7 Stat. 56; (3) that since the lands that were part of the 1814 treaty were taken by threat of force, and since the Yuchi did not sign the treaty of 1802, hence, a cession without the owner's consent, they should recover the value of all these lands in their own right to the exclusion of the Creek national entity.

The Yuchi attempt to solidify their contentions by arguing that while they may have been part of the Creek Confederacy at all pertinent times in question, the confederacy, at least up until 1799, had no centralized government, it being in effect a group of self governing tribes banded together only for mutual defense with the result that title to the lands of the nation was in the constituent tribes themselves rather than in a central government, and that any action by the group had no binding effect on those tribes not assenting thereto.

Their argument continues that since there was no centralized government before 1790 or 1796, the treaties of those years, while purporting to be with the Creek Nation,

were actually treaties between the United States and the individual tribes that were represented by the signatures on the documents and that, therefore, the grants contained in the treaties were to the individual tribes for the lands they then occupied. It is on this basis that the Yuchi claim all the land east of the Flint River as those lands constituted their hunting grounds at that time. The Yuchi further claim that even before the treaties of 1790 and 1796, they had exclusive possession of their hunting grounds and were entitled to such through an agreement with the Creeks dating back to the time they first settled on Creek land. We cannot agree with these arguments. Clearly, we think the treaties were made with the Creek Nation as a whole.

The Yuchi also request reversal on the ground that the Commission erred in consolidating Dockets 21 and 172. We find no merit in this claim.

The scope of this court's jurisdiction on appeal from the Indian Claims Commission is to determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and whether its conclusions are in accordance with the law. In making this determination, the court must review the whole record, Indian Claims Commission Act, Sec. 20 (b), supra. The substantiality of the evidence must take into account whatever in the record as a whole fairly detracts from its weight, The Osage Nation of Indians v. United States, 119 C. Cls. 592; Universal Camera Corporation v. National Labor Relations Board, 340 U. S. 474. After thoroughly reviewing the record in this case, the court is of the opinion that the findings of fact and conclusion of law of the Commission are well supported by substantial evidence in the record as a whole, and therefore, this court affirms the decision of the Commission in Dockets 21 and 172.

To correctly evaluate the position taken by the appellants, the history of the Creek Nation in general and the Yuchi Tribe in particular must be looked to as well as the language of all the treaties involved and negotiations lead-

ing to them. This data as outlined below is part of the findings of fact of the Commission and is supported by substantial evidence in the record.

The Muscogee Tribes which originally formed the Creek Confederacy (later referred to as the Creek Nation) were the aboriginal owners of practically all of the lands which now constitute the States of Georgia and Alabama, including all the lands here in question, and were united into a confederacy at least as early as 1670. Within this confederacy, a distinction usually was made between the Upper and the Lower Creek though they were both integral parts of the entity.

The Yuchi prior to the 18th Century occupied territory in Tennessee but early in that century left this territory and moved in among the Creeks with their consent and eventually settled generally among the Lower Creeks, the principal Yuchi town being located on the banks of the Chattahoochee River among the Lower Creeks. A group of Yuchi did, however, settle on the lower Savannah River in 1729. These settlements were all on aboriginal Creek soil with the permission of the Creeks.

The Commission in its findings of fact determined that at some time before 1751 the Yuchi were incorporated into the Creek Confederacy. In the opinion of the court, the Yuchi were a constituent part of the Creek Nation at least as far back as 1733 when the treaty of May 20, 1733, was entered into with Oglethorpe, Governor of the Colony of Georgia. While this treaty was not signed by the Yuchi it was made with and on behalf of the Creek Nation and ceded certain lands then occupied by the Yuchi to the crown. When terms of the treaty were later violated by some settlers, the Yuchi sent representatives to Oglethorpe to thank him for his subsequent action of clearing the Indian lands of the settlers and thereby living up to the treaty with the Indians. By such action, the Yuchi confessed themselves a part of the Creek Nation and undoubtedly considered themselves bound by treaties of that nation.

Upon being incorporated into the Creek Nation, the Yuchi came under its general government and were subject to its laws though they were permitted to have their own chiefs, and have the right of local self government as was the custom in all Creek towns. They lost their status as an independent tribe and became an integral part of the nation with the privilege of hunting anywhere within the domain.

The policies of the Creek Nation were set by the National Council that met irregularly but usually at least once per year. It was composed of the chiefs of the several towns constituting the Creek Nation, including the Yuchi Chiefs, though their attendance at the council was not compulsory. All decisions of the council were binding on the nation.

Originally title to lands within the domain was felt to be in the aboriginal Creek towns, but with the centralization of the Creek Government title was considered to be in the Creek Nation as a whole. Thereafter, land could be sold or ceded only with the consent of the Creek National Council. Sales or cessions could not be made by any chief or chiefs on their own even though the lands they desired to convey were part of their own town.

While it is generally agreed that title to Creek lands was in the Creek Nation after its centralization, there is, however, some uncertainty as to when the government became centralized. By 1799, it was certainly centralized as the evidence shows that in that year Colonel Benjamin Hawkins, United States Agent to the Creek Nation, called a general council of the Upper and Lower Creek Chiefs and persuaded them to accept a national form of government with regular council meetings. This government was successfully carried on thereafter. There is, nevertheless, definite evidence of centralization and council meetings long before this time, especially during the era of Alexander McGillivray, who was apparently the principal chief of the nation from about 1784 to 1793.

The above referred to treaty of 1733 is certainly indicative of centralization as the treaty was made by the Creek

Nation on behalf of the constituent tribes who considered themselves bound by it. In a subsequent treaty on August 21, 1739, with Oglethorpe, the Creek Nation declared that the lands therein described did by ancient right belong to the Creek Nation as tenants in common, American State Papers, 2 Indian Affairs 786-787 (hereinafter cited A.S.P., 2 I. A.). Appellant itself admits that all lands were nationally owned after centralization, thus this claim of national ownership of lands would tend to indicate centralization.

This position of national ownership of the lands and thus, centralization, was reasserted by the nation in 1786 when Alexander McGillivray speaking for the nation stated that a cession of lands of the Creek Nation could be made only by the "unanimous voice of the whole, as joint proprietors in common." A. S. P., 1 I. A. 18.

In a report by the United States Commissioners to the Indian Country to the Secretary of War on November 20, 1789, A. S. P., 1 I. A. 78, the Commissioners, in reporting on the nature of the government of the Creeks, stated as follows:

> 7. Their kinds of government approach the qualified monarchy. In the towns, they have head-men, who are much respected, and have authority, both in peace and war, in their respective towns; in the districts, they have kings or chiefs, and warriors; the former have their influence in time of peace, and the latter in time of war. Upon all important occasions they meet in great council, and deliberate with freedom, particularly once a year, at the ceremony of the *first fruits*, called the *busking*, when they punish great delinquents, *regulate internal policy* [emphasis added] and form plans for hunting or war the ensuing season.

From these documented facts, there appears to be no doubt that there was a centralized Government prior to 1790 and that its policies were regulatory on the whole nation. Since the Yuchi were a constituent part of the nation since

at least 1733, they must be considered subject to the national laws since that time.

The above claims of title indicate that the nation long before the period of time in question owned, or claimed to own, all the lands of the domain as common property contrary to appellant's claim of the existence of tribal or *talwa* ownership. At least, since the time the Yuchi were incorporated into the Creek Nation the nation claimed this right of absolute sovereignty over all the lands of the domain. It was the law of the nation and the Yuchi being an integral part thereof were subject to it. This right of sovereignty was recognized by the United States in all its dealings with the Creeks and is evidenced by the treaties of 1790, 1796, 1802, 1805, and 1814, and the documentary evidence in the record of events and transactions leading up to the consumation of those treaties. All of these treaties were executed with the Creek Nation as such, after a meeting, and with the approval, of the council. The treaties of 1796 and 1814 and the protest to the treaty of 1814 were signed by Yuchi representatives. Since the treaties were directed to, and signed by the chiefs, on behalf of and for the benefit of all the Creek Nation, the Yuchi by signing the treaties and the protest admit that there was a centralized Creek Government at that time and that they were a part of the nation as it then existed. This admission would also relate back to at least 1790 as the treaty of 1796 was an affirmance of the treaty of 1790, using almost identical language as respecting the contracting parties.

Further evidence of the centralized nature of the Creek Government prior to 1790 and of common ownership of all the lands by the central government is shown by the Creek Government's reaction to three treaties with the State of Georgia made during the 1780's by a few of the chiefs of various towns without sanction from the council. Those treaties—the Treaty of Augusta, November 1, 1783; the Treaty of Galphinton, November 12, 1785; and the Treaty of Shoulderbone on November 3, 1786—were subsequently

disaffirmed by the Creek National Council since they were unauthorized. The State of Georgia was notified that the Creek Nation did not consider the treaties as binding on them.

As a result of this disaffirmance as well as a result of Georgia's insistence that the terms of the treaties and the cessions made therein be lived up to, many disputes and much bloodshed resulted between the Creeks on the one hand and the citizens of the State of Georgia on the other hand. The Creeks steadfastly maintained that the land purportedly ceded was theirs and fought to preserve it as part of their nation.

Because of these hostilities, the President of the United States, George Washington, intervened and appointed Commissioners to attempt to negotiate a treaty with the Indians. The Commissioners' first attempt failed because they attempted by their proposed treaty to have the Indians cede the very land that the Georgians claimed under the previous unauthorized treaties.

As the result of a subsequent invitation by President Washington asking the Creek Nation to send representatives to New York to settle the differences, the Creeks met in general council and appointed a delegation of 26 chiefs led by Alexander McGillivray to go to New York and represent the nation in negotiations leading to the treaty of 1790. The treaty was signed by representatives of the United States and by the 26 Creek delegates. The Yuchi did not have a representative at this convention and no representative of the Yuchi Tribe signed though it was binding on the Yuchi as they were part of the Creek Nation.

All of these events from 1733 to 1790 indicate conclusively that before 1790 when the treaty was executed, there existed a centralized form of government in the Creek Nation and that the Creek National Council had exclusive control over all the lands of the Creek Nation and alone had the power of disposition of them.

The language of the treaty itself and the negotiations that preceded it indicate without a doubt that the Creek Nation as an entity was the body with which the United States was dealing. The United States must have felt that the general council sufficiently regulated the internal affairs of the various tribes or it would have sought out the various tribes and attempted to have dealt with them separately. The treaty stated in part as follows:

> A Treaty of peace and friendship, made and concluded between the President of the United States of America, on the part and behalf of the said States, *and the undersigned kings, chiefs, and warriors, of the Creek Nation of Indians, on the part and behalf of the said nation.* * * *
>
> Article 1. There shall be perpetual peace and friendship between all the citizens of the United States of America, *and all the individuals, towns, and tribes of the Upper, Middle and Lower Creeks and Seminoles, composing the Creek Nation of Indians.*
>
> Article 2. *The undersigned kings, chiefs, and warriors, for themselves, and all parts of the Creek Nation within the limits of the United States,* do acknowledge themselves, and the said parts of the Creek nation, to be under the protection of the United States of America, and of no other sovereign whosoever; and they also stipulate, that the said Creek nation will not hold any treaty with an individual State, or with the individuals of any State. (Emphasis added.)

The fact that the Indian signers spoke "for themselves, and all parts of the Creek Nation within the limits of the United States" embodies within it the Yuchi tribe even though they did not have a signatory representative.

This control by the nation over all their lands and the existence of a centralized government before 1790 is further illustrated by reports, letters and communications between the Indians and the United States representatives, and be-

tween various United States officials appearing in A.S.P., 1 I. A. at 15, 16, 22, 32, 78, and 79. Such contemporaneous data must be given much weight in determining the status of the Yuchi in relation to the Creek Nation at the time in question as well it must be in determining the structure of the Creek National Government during the period of time in question. The Snake or Piute Indians of the Former Malheur Reservation in Oregon v. United States, 125 C Cls 241, 254.

There was subsequently a dispute over one of the articles of the treaty of 1790. McGillivray, at the time of the signing of the treaty, told the United States representatives that he did not know if he could get that particular article confirmed by the council. Disagreements resulted between the United States and the Creeks but later, after McGillivray's death, in general council, the Creek Chiefs said that they considered the treaty of 1790 as binding on them as "those men that went on there,[1] before the President of the United States, were invested with full power to make every thing that was done there binding on the whole Creek Nation." A. S. P., 1 I. A. 603. The treaty of June 29, 1796, more commonly known as the Treaty of Colerain, was then executed by the United States with the Creeks and was in effect an affirmance of the obligatory nature of the treaty of 1790 on the contracting parties. Representatives of the principal Yuchi town were in attendance at the treaty councils leading to the execution of the treaty and a representative of that town signed the treaty.

This treaty states in part:

> A treaty of peace and friendship, made and concluded between the President of the United States of America on the one part, and behalf of the said States, *and the undersigned kings, chiefs, and warriors, of the Creek nation of Indians, on the part of said nation.*
>
> The parties being desirous of establishing permanent peace and friendship between the United States

1. To New York.

and the said Creek nation, and the citizens and members thereof, and to remove the causes of war, by ascertaining their limits, and making other necessary, just, and friendly arrangement, the President of the United States, by Benjamin Hawkins, George Clymer, and Andrew Pickens, Commissioners, whom he hath constituted with power for these purposes, by and with the advice and consent of the Senate, and the Creek nation of Indians, *by the undersigned kings, chiefs, and warriors, representing the whole Creek nation, have agreed to the following articles*:

Article 1. The Treaty entered into at New York, between the parties, on the 7th day of August, 1790, is, and shall remain, obligatory on the contracting parties, according to the terms of it, except as herein provided for. * * * (Emphasis supplied.)

The language above quoted plus the fact that the treaty was confirmed by the national council further indicates the sovereign quality of the Creek Nation. The fact that the Yuchi signed is their admission that the council was their sovereign and that they were subservient thereto. Thus, the Yuchi claim that the Creek government was not centralized until much later is proved to be in error as well as is their contention that there existed individual tribal ownership rather than national ownership.

The Yuchi, nevertheless, claim title to the lands and insist that that title was *granted* to them by the treaties of 1790 and 1796. They contend that since the title was not divested before the cessions of 1802 and 1814, they are entitled to recover for the value of the lands thereby ceded. The fallacy of this argument is shown merely by looking to the language of the treaties of 1790 and 1796, and we cannot, therefore, agree with the Yuchi's contentions.

A merely cursory reading will show that there are no words of *grant* contained anywhere therein. The purpose of the treaty of 1790 was to establish the boundaries of the Creek Nation. Once established the United States *guaran-*

teed that all the Creek lands thus defined would be protected. The treaty *granted* nothing to the Yuchi, the Creeks, or anyone else. Article 5 of the treaty of 1790 provides for this guarantee:

> Article 5. The United States solemnly *guarantee to the Creek nation*, all of their lands within the limits of the United States, to the westward and southward of the boundary described by the preceding article. (Emphasis supplied.)

Since this guarantee was affirmed by the treaty of 1796, it is unmistakable that no title was *granted* to anyone by the treaties of 1790 and 1796. Even if there was a grant, it would have been to the Creek Nation since, as pointed out above, the United States was dealing only with that centralized unit, and not with all the signers individually as claimed by the appellant. It was fully recognized by the United States that the Creek Nation was and had been the owners of the lands.

On the other hand, if there was a grant contained in the 1790 treaty it still could not have been to the Yuchi even if the United States was dealing with all the signers individually which is the substance of the Yuchi argument. The Yuchi did not sign the 1790 treaty and the treaty of 1796 was simply a reaffirmation of the 1790 document. Any grant contained therein could not have been to a non-signer. The later treaty provides only that the earlier one shall remain obligatory on the "contracting parties." The Yuchi were not a contracting party to the 1790 treaty, therefore, any thing contained in it would not affect them. Since the balance of the language of the treaty of 1796 does not refer to the lands in question there is no possible way the Yuchi could claim a grant of land to them even if the treaty of 1790 or the treaty of 1796 made a grant—this by the appellant's own argument.

Since aboriginal title to the land in question was in the tribes that originally formed the Creek Confederacy (Na-

tion), that title passing to the Nation upon its centralization, and since there was no grant to the Yuchi in the treaties of 1790 and 1796 and could have been none as the United States did not own the land, and since the Yuchi did not own the land in their own right at any time, let alone at the time of the cessions of 1802 and 1814, their claim for recovery is a thing of naught and must be denied.

While not necessary for the decision of this case, the remaining claim of the appellant to the land will be discussed, that is, their claim of a right of exclusive possession of their own hunting grounds which they allegedly obtained by agreement with the Creek Nation when they first settled there. They contend that, in this respect, they differed from other tribes of the nation and were in a special position within it. In support of this contention appellant had their current Chief testify as to his talks with the old people of the tribe, and of tribal tradition to the effect that exclusive possession of the hunting lands was in the Yuchi to the exclusion of everyone. The Yuchi also, in support of this allegation, point to the writings of William Bartram who states that:

> Every individual inhabitant has an equal right to the soil and to hunt and range over this region,[2] except within the jurisdiction of each town or village, which I believe seldom extends beyond its habitations and planting grounds. *Perhaps the Uches are to be excepted. They claim an exclusive property by right of a contract or treaty made when they entered into alliance with the Muscogulgees;* but though they sometimes put the Creeks in mind of this privilege, when their hunters make too free with their hunting grounds, yet the dispute seldom goes further, as the Confederacy are cautious of offending the Uches and yield to their common interest and safety. [Emphasis supplied.] Bartram, Observation of the Creek and Cherokee Indians 22.

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2. "this region" refers to the Creek Nation.

Bartram's writing, however, were, by his own admission, only observations and conjecture, Bartram, *op. cit. supra,* at 22, thus, *title* to the lands claimed by the Yuchi could not be proven by the above excerpt alone, and the Yuchi do not claim such on the basis of the above. They point out the statement only as being evidence of their right of exclusive *possession* to their hunting grounds. Exclusive *possession,* however, does not constitute *title* to lands where there is a higher national government. The appellant, in effect, admits this as in its brief at page 7 as follows:

> In reading our summary of this evidence we ask the Court to keep in mind that such evidence is presented not to show *aboriginal* Indian title to the land sued for (which, in our opinion, neither the Yuchi nor the Creeks have proven) but to show the relation of the Yuchi and the Creeks in 1790 and 1796, and thus establish under *Ottawa*[3] that title to the land sued for was *granted* to the Yuchi by the treaties of those dates. (Italics theirs.)

This is, in effect, a concession by appellants that the Yuchi did not get title as a result of their exclusive possession (and we do not decide that they did have exclusive possession), and that they did not have *title* before 1790. The true relation of the Yuchi and the Creeks as well as the claim of grant has already been dispensed with and nothing more need be said.

We do not feel that it is necessary to go into the applicability of the Ottawa case other than to say that the basic facts are at variance with those in this case. In that case, the facts failed to show that there was a chief of the entire nation or a general council of the entire nation of the Ottawas having control over all the lands. The facts did show, however, that the various bands of Ottawas had the authority to dispose of the land they occupied, this even though

3. The Ottawa Tribe of Indians, et al., v. United States, 2 Ind. Cl. Comm. 461.

other bands of Ottawas may have had some interest therein. The facts of the case at hand show the contrary, that is, that there was a centralized Creek Government, that there was a national council which regulated internal policy, and that land could be conveyed or ceded only with the council's approval. Therefore, the decision in the Ottawa case that treaties made with the "Ottawa Nation" were with the individual tribes signing thereto is inapplicable here.

While the Yuchi are not entitled to any indemnification in their own right, they will participate in any award made in Docket No. 21 as compensation for the property taken unjustly by the treaty of 1814. As the cession of 1802 was made with the consent of the national council and the Indians were compensated for it at the time of the cession, there can be no recovery as to it in either Docket Nos. 21 or 172.

The only remaining issue to be discussed is the appellant's assertion that the Indian Claims Commission erred in allowing consolidation of Docket Nos. 21 and 172 for purposes of trial. The only thing that need be said respecting this is that since a situation existed whereby two groups were laying claim to the same land, The Creek Nation in Docket No. 21, and The Yuchi Tribe of Indians in Docket No. 172, the Commission correctly consolidated the cases as such was necessary to determine who actually owned the land during the period of time in question and to avoid the possibility of multiple liability on the part of the United States.

The findings and conclusions of the Indian Claims Commission are in all respects affirmed.

It is so ordered.

Laramore, *Judge;* Madden, *Judge;* Whitaker, *Judge;* and Jones, *Chief Judge* concur.

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11. *Appendix K*—Before Indian Claims Commission, opinion of Commission, June 4, 1951, Docket No. 21.....44-48
12. *Appendix L*—Before Indian Claims Commission, opinion of Commission, dated April 22, 1952, Docket No. 21.....49-64
13. *Appendix M*—Before Indian Claims Commission, opinion of the Commission, dated May 5, 1955, Docket No. 21.....64-77
14. *Appendix N*—Before Indian Claims Commission, opinion of Commission, May 16, 1955, Docket No. 172.....78-87
15. *Appendix O*—In United States Court of Claims, opinion of Court of Claims, May 6, 1952, Appeals Docket No. 14.....87-104

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1956.

No. _____

THE YUCHI (EUCHEE) TRIBE OF INDIANS, S. W. BROWN, LEGUS BROWN, JACOB ROLLAND, WILLIE TIGER, FRED SKEETER, and JESSE JAMES, all members of said Tribe, Band or Other Group of Indians, for Themselves and for the Use and Benefit of All Other Members of said Yuchi (Euchee) Tribe, Band, or Group of Indians, below Docket No. 172,

Appellants,

vs.

THE UNITED STATES OF AMERICA, *Appellee,*

Consolidated With

CREEK NATION, Below Docket No. 21, *Appellee,*

vs.

THE UNITED STATES OF AMERICA, *Appellee,*

THE CREEK NATION EAST, *Interpleader,* below in Docket No. 21, *Appellee.*

On Petition for Writ of Certiorari to the United States Court of Claims.

SEPARATE APPENDIX.

The several opinions, treaties and statutes required by Rule 23 to be appended to the Petition are voluminous. It is thought to be more convenient that they be separately presented. They are as follows:

Appendix A.

TREATY WITH THE CREEKS, 1790.

Aug. 7, 1790; 7 Stat., 35; Proclmaation, Aug. 13, 1790.

A treaty of Peace and Friendship made and concluded between the President of the United States of America,

on the Part and Behalf of the said States, and the undersigned Kings, Chief and Warriors of the Creek Nation of Indians, on the Part and Behalf of the said Nation.

The parties being desirous of establishing permanent peace and friendship between the United States and the said Creek Nation, and the citizens and members thereof, and to remove the causes of war by ascertaining their limits, and making other necessary, just and friendly arrangements: The President of the United States, by Henry Knox, Secretary of the Department of War, whom he hath constituted with full powers for these purposes, by and with the advice and consent of the Senate of the United States, and the Creek Nation, by the undersigned Kings, Chiefs and Warriors, representing the said nation, have agreed to the following articles.

Article I. There shall be perpetual peace and friendship between all the citizens of the United States of America, and all the individuals, towns and tribes of the Upper, Middle and Lower Creeks and Semanolies composing the Creek nation of Indians.

Article II. The undersigned Kings, Chiefs and Warriors, for themselves and all parts of the Creek Nation within the limits of the United States, do acknowledge themselves, and the said parts of the Creek nation, to be under the protection of the United States of America, and of no other sovereign whosoever; and they also stipulate that the said Creek Nation will not hold any treaty with an individual State, or with individuals of any State.

Article III. The Creek Nation shall deliver as soon as practicable to the commanding officer of the troops of the United States, stationed at the Rock-Landing on the Oconee river, all citizens of the United States, white inhabitants or negroes, who are now prisoners in any part of the said nation. And if any such prisoners or negroes should not be so delivered, on or before the first day of June ensuing, the

governor of Georgia may empower three persons to repair to the said nation, in order to claim and receive such prisoners and negroes.

Article IV. The boundary between the citizens of the United States and the Creek Nation is, and shall be, from where the old line strikes the river Savannah; thence up the said river to a place on the most northern branch of the same, commonly called the Keowee, where a north east line to be drawn from the top of the Occunna mountain shall intersect; thence along the said line in a south-west direction to Tugelo river; thence to the top of the Currahee mountain; thence to the head or source of the main south branch of the Oconee river, called the Appalachee; thence down the middle of the said main south branch and river Oconee, to its confluence with the Oakmulgee, which form the river Altamaha; and thence down the middle of the said Altamaha to the old line on the said river, and thence along the said old line to the river St. Mary's.

And in order to preclude forever all disputes relatively to the head or source of the main south branch of the river Oconee, at the place where it shall be intersected by the line aforesaid, from the Currahee mountain, the same shall be ascertained by an able surveyor on the part of the United States, who shall be assisted by three old citizens of Georgia, who may be appointed by the Governor of the said state, and three old Creek chiefs, to be appointed by the said nation; and the said surveyor, citizens and chiefs shall assemble for this purpose, on the first day of October, one thousand seven hundred and ninety-one, at the Rock Landing on the said river Oconee, and thence proceed to ascertain the said head or source of the main south branch of the said river, at the place where it shall be intersected by the line aforesaid, to be drawn from the Currahee mountain. And in order that the said boundary shall be rendered distinct and well known, it shall be marked by a line of felled trees at least twenty feet wide, and the trees chopped on each side from the said Currahee mountain, to the head or

source of the said main south branch of the Oconee river, and thence down the margin of the said main south branch and river Oconee for the distance of twenty miles, or as much farther as may be necessary to mark distinctly the said boundary. And in order to extinguish forever all claims of the Creek nation, or any part thereof, to any of the land lying to the northward and eastward of the boundary herein described, it is hereby agreed, in addition to the considerations heretofore made for the said land, that the United States will cause certain valuable Indian goods now in the state of Georgia, to be delivered to the said Creek nation; and the said United States will also cause the sum of one thousand and five hundred dollars to be paid annually to the said Creek nation. And the undersigned Kings, Chiefs and Warriors, do hereby for themselves and the whole Creek nation, their heirs and descendants, for the considerations above-mentioned, release, quit claim, relinquish and cede, all the land to the northward and eastward of the boundary herein described.

Article V. The United States solemnly guarantee to the Creek Nation, all their lands within the limits of the United States to the westward and southward of the boundary described in the preceding article.

Article VI. If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the Creeks lands, such person shall forfeit the protection of the United States, and the Creeks may punish him or not, as they please.

Article VII. No citizen or inhabitant of the United States shall attempt to hunt or destroy the game on the Creek lands: Nor shall any such citizen or inhabitant go into the Creek country, without a passport first obtained from the Governor of some one of the United States, or the officer of the troops of the United States commanding at the nearest military post on the frontiers, or such other person as the President of the United States may, from time to time, authorize to grant the same.

Article VIII. If any Creek Indian or Indians, or person residing among them, or who shall take refuge in their nation, shall commit a robbery or murder, or other capital crime, or any of the citizens or inhabitants of the United States, the Creek nation, or town, or tribe to which such offender or offenders may belong, shall be bound to deliver him or them up, to be punished according to the laws of the United States.

Article IX. If any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to the Creek nation of Indians, and shall there commit any crime upon, or trespass against the person or property of any peaceable and friendly Indian or Indians, which if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punshable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner, as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof.

Article X. In cases of violence on the persons or property of the individuals of either party, neither retaliation nor reprisal shall be committed by the other, until satisfaction shall have been demanded of the party, of which the aggressor is, and shall have been refused.

Article XI. The Creeks shall give notice to the citizens of the United States of any designs, which they may know or suspect to be formed in any neighboring tribe, or by any person whatever, against the peace and interests of the United States.

Article XII. That the Creek nation may be led to a greater degree of civilization, and to become herdsmen and cultivators, instead of remaining in a state of hunters, the

United States will from time to time furnish gratuitously the said nation with useful domestic animals and implements of husbandry. And further to assist the said nation in so desirable a pursuit, and at the same time to establish a certain mode of communication, the United States will send such, and so many persons to reside in said nation as they may judge proper, and not exceeding four in number, who shall qualify themselves to act as interpreters. These persons shall have lands assigned them by the Creeks for cultivation, for themselves and their successors in office; but they shall be precluded exercising any kind of traffic.

Article XIII. All animosities for past grievances shall henceforth cease; and the contracting parties will carry the foregoing treaty into full execution, with all good faith and sincerity.

Article XIV. This treaty shall take effect and be obligatory on the contracting parties, as soon as the same shall have been ratified by the President of the United States, with the advice and consent of the Senate of the United States.

In witness of all and every thing herein determined, between the United States of America, and the whole Creek nation, the parties have hereunto set their hands and seals, in the city of New York, within the United States, this seventh day of August, one thousand seven hundred and ninety.

In behalf of the United States:

H. Knox, [L. S.]
Secretary of War and sole commissioner for treating with the Creek nation of Indians

In behalf of themselves and the whole Creek nation of Indians:

Alexander McGillivray,

Cusetahs:
Fuskatche Mico, or Birdtail King, his x mark,
Neathlock, or Second Man, his x mark,
Halletemalthle, or Blue Giver, his x mark,

Little Tallisee:
Opay Mico, or the Singer, his x mark,
Totkeshajou, or Samoniac, his x mark,

Big Tallisee:
Hopothe Mico, or Tallisee King, his x mark,
Opototache, or Long Side, his x mark,

Tuckabatchy:
Soholessee, or Young Second Man, his x mark,
Ocheehajou, or Aleck Cornel, his x mark,

Natchez:
Chinabie, or the Great Natchez Warrior, his x mark,
Natsowachehee, or the Great Natchez Warrior's

Brother, his x mark,
Thakoteehee, or the Mole, his x mark,
Oquakabee, his x mark,

Cowetas:
Tuskenaah, or Big Lieutenant, his x mark,
Homatah, or Leader, his x mark,
Chinnabie, or Matthews, his x mark,
Juleetaulematha, or Dry Pine, his x mark, Of the

Broken Arrow:
Chawookly Mico, his x mark,

Coosades:
Coosades Hopoy, or the Measurer, his x mark,
Muthtee, the Misser, his x mark,
Stimafutchkee, or Good Humor, his x mark,

Alabama Chief:
Stilnaleeje, or Disputer, his x mark,

Oaksoys:
Mumagechee, David Francis, his x mark,

(*Printer's note*: After each name appears "[L. S.]".)

Done in the presence of—Richard Morris, chief justice of the State of New York; Richard Varick, mayor of the city of New York; Marinus Willet; Thomas Lee Shippen, of

Pennsylvania; John Rutledge, jun'r; Joseph Allen Smith; Henry Izard; Joseph Cornell, interpreter, his x mark.

Appendix B.

TREATY WITH THE CREEKS, 1796.

June 29, 1796; 7 Stat., 56; Proclamation, Mar. 18, 1797.

A treaty of peace and friendship made and concluded between the President of the United States of America, on the one Part, and Behalf of the said States, and the undersigned Kings, Chiefs and Warriors of the Creek Nation of Indians, on the Part of the said Nation.[a]

The parties being desirous of establishing permanent peace and friendship between the United States and the

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a. This treaty was ratified on condition that the third and fourth articles should be modified as follows:

The Senate of the United States, two-thirds of the Senators present concurring, did, by their resolution of the second day of March instant, "consent to, and advise the President of the United States, to ratify the Treaty of Peace and Friendship, made and concluded at Coleraine, in the state of Georgia, on the 29th June, 1796, between the President of the United States of America, on the part and behalf of the said States, and the Kings, Chiefs and Warriors of the Creek nation of Indians, on the part of the said nation: *Provided*, and on condition, that nothing in the third and fourth articles of the said treaty, expressed in the words following, Article 3d. The President of the United States of America shall have full powers, whenever he may deem it advisable, to establish a trading or military post on the south side of the Altamaha, on the bluff, about one mile above Beard's bluff, or any where from thence down the said river on the lands of the Indians, to garrison the same with any part of the military force of the United States, to protect the post, and to prevent the violation of any of the provisions or regulations subsisting between the parties. And the Indians do hereby assent to the post aforesaid, a tract of land of five miles square, bordering one side on the river, which post and the lands annexed thereto, are hereby ceded to, and shall be to the use, and under the government of the United States of America.

Art. 4th. As soon as the President of the United States has determined on the time and manner of running the line from the Currahee Mountain, to the head or source of the main south branch of the Oconee, and notified the Chiefs of the Creek nation of the same, a suitable number

said Creek nation, and the citizens and members thereof; and to remove the causes of war, by ascertaining their limits, and making other necessary, just and friendly arrangements; the President of the United States, by Benjamin Hawkins, George Clymer, and Andrew Pickens,. Commissioners whom he hath constituted with powers for these purposes, by and with the advice and consent of the Senate; and the Creek Nation of Indians, by the undersigned Kings, Chiefs and Warriors, representing the whole Creek Nation, have agreed to the following articles:

Article I. The Treaty entered into, at New-York, between the parties on the 7th day of August, 1790, is, and shall remain obligatory on the contracting parties, according to the terms of it, except as herein provided for.

Article II. The boundary line from the Currahee mountain, to the head, or source of the main south branch of the Oconee' river, called, by the white people, Appalatchee, and by the Indians, Tulapocka, and down the middle of the same, shall be clearly ascertained, and marked, at such time, and in such manner, as the President shall direct. And the Indians will, on being informed of the determina-

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of persons on their part shall attend, to see the same completed: And if the President should deem it proper, then to fix on any place or places adjoining the river, and on the Indian lands for military or trading posts: the Creeks who attend there, will concur in fixing the same, according to the wishes of the President. And to each post, the Indians shall annex a tract of land of five miles square, bordering one side on the river. And the said lands shall be to the use and under the government of the United States of America. *Provided always*, that whenever any of the trading or military posts mentioned in this treaty, shall, in the opinion of the President of the United States of America, be no longer necessary for the purposes intended by this cession, the same shall revert to, and become a part of the Indian lands,' shall be construed to affect any claim of the state of Georgia, to the right of preemption in the land therein set apart for military or trading posts; or to give to the United States without the consent of the said state, any right to the soil, or to the exclusive legislation over the same, or any other right than that of establishing, maintaining, and exclusively governing military and trading posts within the Indian territory mentioned in the said articles, as long as the frontier of Georgia may require these establishments."

tion of the President, send as many of their old chiefs, as he may require, to see the line ascertained and marked.

Article III.[a] The President of the United States of America shall have full powers, whenever he may deem it advisable, to establish a trading or military post on the south side of the Alatamaha, on the bluff, about one mile above Beard's bluff; or any where from thence down the said river on the lands of the Indians, to garrison the same with any part of the military force of the United States, to protect the posts, and to prevent the violation of any of the provisions or regulations subsisting between the parties: And the Indians do hereby annex to the post aforesaid, a tract of land of five miles square, bordering one side on the river; which post and the lands annexed thereto, are hereby ceded to, and shall be to the use, and under the government of the United States of America.

Article IV[a]. As soon as the President of the United States has determined on the time and manner of running the line from the Currahee mountain, to the head or source of the main south branch of the Oconee, and notified the chiefs of the Creek land of the same, a suitable number of persons on their part shall attend to see the same completed: And if the President should deem it proper, then to fix on any place or places adjoining the river, and on the Indian lands for military or trading posts; the Creeks who attend there, will concur in fixing the same, according to the wishes of the President. And to each post, the Indians shall annex a tract of land of five miles square, bordering one side on the river. And the said lands shall be to the use and under the government of the United States of America. *Provided always,* that whenever any of the trading or military posts mentioned in this treaty, shall, in the opinion of the President of the United States of America, be no longer necessary for the purposes intended by this cession, the same shall revert to, and become a part of the Indian lands.

a. See note at the beginning of the treaty.

Article V. Whenever the President of the United States of America, and the king of Spain, may deem it advisable to mark the boundaries which separate their territories, the President shall give notice thereof to the Creek chiefs, who will furnish two principal chiefs, and twenty hunters to accompany the persons employed on this business, as hunters and guides from the Chocktaw country, to the head of St. Mary's. The chiefs shall receive each half a dollar per day, and the hunters one quarter of a dollar each per day, and ammunition, and a reasonable value for the meat delivered by them for the use of the persons on this service.

Article VI. The Treaties of Hopewell, between the United States and the Chocktaws and Chickasaws, and at Holston between the Cherokees and the United States, mark the boundaries of those tribes of Indians. And the Creek nation do hereby relinquish all claims to any part of the territory inhabited or claimed by the citizens of the United States, in conformity with the said treaties.

Article VII. The Creek nation shall deliver, as soon as practicable, to the superintendent of Indian affairs, at such place as he may direct, all citizens of the United States; white inhabitants and negroes who are now prisoners in any part of the said nation, agreeably to the treaty at New-York, and also all citizens, white inhabitants, negroes and property taken since the signing of that treaty. And if any such prisoners, negroes or property shall not be delivered, on or before the first day of January next, the governor of Georgia may empower three persons to repair to the said nation, in order to claim and receive such prisoners, negroes and property, under the direction of the President of the United States.

Article VIII. In consideration of the friendly disposition of the Creek nation towards the government of the United States, evidenced by the stipulations in the present treaty, and particularly the leaving it in the discretion of the President to establish trading or military posts on their

lands; the commissioners of the United States, on behalf of the said states, give to the said nation, goods to the value of six thousand dollars, and stipulate to send to the Indian nation, two blacksmiths, with strikers, to be employed for the upper and lower Creeks with the necessary tools.

Article IX. All animosities for past grievances shall henceforth cease, and the contracting parties will carry the foregoing treaty into full execution with all good faith and sincerity. *Provided nevertheless,* That persons now under arrest, in the state of Georgia, for a violation of the treaty at New York, are not to be included in this amnesty, but are to abide the decision of law.

Article X. This treaty shall take effect and be obligatory on the contracting parties, as soon as the same shall have been ratified by the President of the United States, by and with the advise and consent of the senate.

Done at Colerain, the 29th of June, one thousand seven hundred and ninety-six.

Benjamin Hawkins,
George Clymer,
Andrew Pickens,

Cowetas:
Chruchateneah, his x mark,
Tusikia Mico, his x mark,
Inclenis Mico, his x mark,
Tuskenah, his x mark,
Ookfuskee Tustuneka, his x mark,
Clewalee Tustuneka, his x mark,

Cussitas:
Tusikia Mico, his x mark,
Cussita Mico, his x mark,
Fusateehee Mico, his x mark,
Opoey Mico, his x mark,

Broken Arrows:
Tustuneka Mico, his x mark,

Othley Opoey, his x mark,
Opoey Tustuneka, his x mark,
Oboethly Tustuneka, his x mark,

Euchees:
Euchee Mico, his x mark,

Usuchees:
Osaw Enehah, his x mark,
Ephah Tuskenah, his x mark,
Tusikia Mico, his x mark,

Chehaws:
Chehaw Mico, his x mark,

Talehanas:
Othley Poey Mico, his x mark,
Othley Poey Tustimiha, his x mark,

Oakmulgees:
Opoey Thlocco, his x mark,
Parachuckley, his x mark,
Tuskenah, his x mark,

Euphales:
Pahose Mico, his x mark,
Tustunika Chopco, his x mark,
Ottassees:
Fusatchee Hulloo Mico, his x mark,
Tusikia Mico, his x mark,
Mico Opoey, his x mark,

Tallessees:
Tallessee Mico, his x mark,
Othley Poey Mico, his x mark,

Little Oakjoys:
Meeke Matla, his x mark,

Hicory Ground:
Opoey Mico, his x mark,

Kuyalegees:
Kelese Hatkie, his x mark,

Weakis:
Nenehomotca Opoey, his x mark,
Tusikia Mico, his x mark,

Cleewallees:
Opoey-e-matla, his x mark,

Coosis:
Hosonupe Hodjo, his x mark,

Tuckabathees:
Holahto Mico, his x mark,
Tustunika Thlocco, his x mark,

Oakfusgees:
Pahphalaha, his x mark,

Abacouchees:
Spani Hodjo, his x mark,
Tustonika, his x mark,

Upper Euphaules:
Opoey, his x mark,

Natchees:
Chinibe, his x mark,

Upper Cheehaws:
Spokoi Hodjo, his x mark,
Tustunika, his x mark,

Mackasookos:
Tuskeehenehaw, his x mark,

Oconees:
Knapematha Thlocco, his x mark,

Cusetahs:
Cusa Mico, his x mark,
Tusekia Mico Athee, his x mark,
Halartee Matla, his x mark,
Talahoua Mico, his x mark,
Neathlocto, his x mark,
Nuckfamico, his x mark,
Estechaco Mico, his x mark,

Tuskegee Tuskinagee, his x mark,
Cochus Mico, his x mark,
Opio Hajo, his x mark,
Oneas Tustenagee, his x mark,
Alak Ajo, his x mark,
Stilcpeck Chatee, his x mark,
Tuchesee Mico, his x mark,

Kealeegees:
Cheea Hajo, his x mark,

Hitchetaws:
Talmasee Matla, his x mark,

Tuckabatchees:
Tustincke Hajo, his x mark,
Okolissa, his x mark,
Coweta Matla, his x mark,
Coosa Mico, his x mark,
Fusatchee Mico, his x mark,
Pio Hatkee, his x mark,
Foosatchee Mico, his x mark,
Neathlaco, his x mark,
Tuchabatchee Howla, his x mark,
Spoko Hajo, his x mark,

Coosis:
Tuskegee Tustinagee, his x mark,
Talmasa Watalica, his x mark,

Euphalees:
Totkes Hago, his x mark,

Otasees:
Opio Tustinagee, his x mark,
Yafkee Mall Hajo, his x mark,
Oboyethlee Tustinagee, his x mark,
Tustinagee Hajo, his x mark,
Hillibee Tustinagee Hajo, his x mark,
Effa Tuskeena, his x mark,
Emathlee Loco, his x mark,
Tustanagee Mico, his x mark,

Yaha Tustinagee, his x mark,
Cunctastee Tustanagee, his x mark,

Ottasees:
Coosa Tustinagee, his x mark,
Neamatle Matla, his x mark,

Kialeegees:
Chuckchack Nincha, his x mark,
Opoyo Matla, his x mark,
Lachlee Matla, his x mark,

Big Tallasees:
Chowostia Hajo, his x mark,
Neathloco Opyo, his x mark,
Neathloco, his x mark,
Chowlactley Mico, his x mark,
Tocoso Hajo, his x mark,
Hoochee Matla, his x mark,
Howlacta, his x mark,
Tustinica Mico, his x mark,
Opoy Fraico, his x mark,

Big Talassee:
Houlacta, his x mark,
Etcatee Hajo, his x mark,
Chosolop Hajo, his x mark,
Coosa Hajo, his x mark,

Tuchabatchees:
Chohajo, his x mark,

Weeokees:
Tusticnika Hajo, his x mark,

Tuchabathees:
Neamatoochee, his x mark,

Cussitas:
Telewa Othleopoya, his x mark,
Talmasse Matla, his x mark,
Niah Weathla, his x mark,
Emathlee-laco, his x mark,

Ottesee Matla, his x mark,
Muclassee Matla, his x mark,
Eufallee Matla, his x mark,

Tuckabatchees:

Cunipee Howla, his x mark,

Cowetas:

Hospotak Tustinagee, his x mark,

Natchez:

Spoko Hodjo, his x mark,

Uchees:

Tustinagee Chatee, his x mark,

Usuchees:

Spokoca Tustinagee, his x mark,
Othley-poey-Tustinagee, his x mark,
Tuskeeneah, his x mark,

(*Printer's note*: After each name appears "[L. S.]")

Witness: J. Seagrove, superintendent Indian affairs, C. N. Henry Gaither, lieutanant-colonel commandant, Const. Freeman, A. W. D., major artillery and engineers, Samuel Tinsley, captain, Third sub-legion. Samuel Allison, ensign, Second sub-legion. John W. Thompson, ensign, First U. S. S. legion. Geo. Gillasspy, surgeon, L. U. S Tim Barnard, D. A. and sworn interpreter, James Burges, D. A. and sworn interpreter. James Jordan. Richard Thomas. Alexander Cornels. William Eaton, captain, Fourth U. S. sub-legion, commandant at Colerain, and secretary to the commission.

Appendix C.

TREATY WITH THE CREEKS, 1802.

June 16, 1802; 7 Stat. 68, Proclamation, Jan. 11, 1803.

A Treaty of Limits between the United States of America and the Creek Nation of Indians.

Thomas Jefferson, President of the United States of America, by James Wilkinson, of the state of Maryland,

Brigadier General [illegible] the army of the United States, Benjamin Hawkins, of [illegible]rth-Carolina, and Andrew Pickens of South-Carolina, Commissioners Plenipotentiary of the United States, on the one part, and the Kings, Chiefs, Head Men and Warriors of the Creek Nation, in council assembled, on the other part, have entered into the following articles and conditions, viz.

Article I. The Kings, Chiefs, Head men and Warriors of the Creek nation, in behalf of the said nation, do by these presents cede to the United States of America, all that tract and tracts of land, situate, lying and being within and between the following bounds, and the lines and limits of the extinguished claims of the said nation, heretofore ascertained and established by treaty. That is to say—beginning at the upper extremity of the high shoals of the Appalachee river, the same being a branch of the Oconee river, and on the southern bank of the same—running thence a direct course to a noted ford of the south branch of Little river, called by the Indians Chat-to-chuc-co-hat-chee—thence a direct line to the main branch of Commissioners' creek, where the same is intersected by the path leading from the rock-landing to the Ocmulgee Old Towns, thence a direct line to Palmetto Creek, where the same is intersected by the Uchee path, leading from the Oconee to the Ocmulgee river—thence down the middle waters of the said Creek to Oconee river, and with the western bank of the same to its junction with the Ocmulgee river, thence across the Ocmulgee river to the south bank of the Altamaha river, and down the same at low water mark to the lower bank of Goose Creek, and from thence by a direct line to the Mounts, on the Margin of the Okefinocau swamp, raised and established by the commissioners of the United States and Spain at the head of the St. Mary's river; thence down the middle waters of the said river, to the point where the old line of demarkation strikes the same, thence with the said old line to the Altamaha river, and up the same to Goose Creek: and the said Kings, Chiefs, Head men and Warriors,

do relinquish and quit claim to the United States all their right, title, interest and pretensions, in and to the tract and tracts of land within and between the bounds and limits aforesaid, for ever.

Art. II. The commissioners of the United States, for and in consideration of the foregoing concession on the part of the Creek nation, and in full satisfaction for the same do hereby covenant and agree with the said nation, in behalf of the United States, that the said states shall pay to the said nation, annually, and every year, the sum of three thousand dollars, and one thousand dollars for the term of ten years, to the chiefs who administer the government, agreeably to a certificate under the hands and seals of the commissioners of the United States, of this date, and also twenty-five thousand dollars in the manner and form following, viz., ten thousand dollars in goods and merchandise, the receipt of which is hereby acknowledged; ten thousand dollars to satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States; the said debts, after the payment aforesaid, to become the right and property of the Creek nation, and to be recovered for their use in such way and manner as the President of the United States may think proper to direct; five thousand dollars to satisfy claims for property taken by individuals of the said nation, from the citizens of the United States, subsequent to the treaty of Colerain, which has been or may be claimed and established agreeably to the provisions of the act for regulating trade and intercourse with the Indian tribes, and to preserve peace on the frontiers. And it is further agreed that the United States shall furnish to the said nation two sets of blacksmiths tools, and men to work them, for the term of three years.

Art. III. It is agreed by the contracting parties, that the garrison or garrisons which may be found necessary for the protection of the frontiers, shall be established upon the land of the Indians, at such place or places as the

President of the United States may think proper to direct, in the manner and on the terms established by the treaty of Colerain.

Art. IV. The contracting parties to these presents, do agree that this treaty shall become obligatory and of full effect so soon as the same shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof.

In testimony whereof, the commissioners plenipotentiary of the United States, and the kings, chiefs, head men, and warriors, of the Creek nation, have hereunto subscribed their names and affixed their seals, at the camp of the commissioners of the United States, near fort Wilkinson, on the Oconee river, this sixteenth day of June, in the year of our Lord one thousand eight hundred and two, and of the independence of the United States the twenty-sixth.

James Wilkinson, [L. S.]
Benjamin Hawkins, [L. S.]
Andrew Pickens, [L. S.]

Efau Haujo, his x mark,
1 Tustunnuggee Thlucco, his x mark,
2 Hopoie Micco, his x mark,
3 Hopoie Olohtau, his x mark,
Tallessee Micco, his x mark,
Tussekia Micco, his x mark,
Micco Thlucco, his x mark,
Tuskenhau Chapco, his x mark,
Chouwacke le Micco, his x mark,
Toosce hatche Micco, his x mark,
Hopoie Yauholo, his x mark,
Hoithlewau le Micco, his x mark,
Efau Haujo, of Cooloome, his x mark,
Cussetuh Youholo, his x mark,
Wewocau Tustunnuggee, his x mark,
Nehomahte Tustunnuggee, his x mark,
Tustunu Haujo, his x mark,

Hopoie Tstunnuggee, his x mark,
Talchischau Micco, his x mark,
Yaufkee Emautla Haujo, his x mark,
Coosaudee Tustunnuggee, his x mark,
Nenehomohtau Tustunnuggee Micco, his x mark,
Isfaupau Tustunnuggee, his x mark,
Efaulau Tustunnuggee, his x mark,
Tustunnuc Hoithlepoyuh, his x mark,
Ishopei Tustunnuggee, his x mark,
Cowetuh Tustunnuggee, his x mark,
Hopoithle Haujo, his x mark,
Wocsee Haujo, his x mark,
Uctijutchee Tustunnuggee, his x mark,
Okelesau Hutkee, his x mark,
Pahose Micco, his x mark,
Micke Emautlau, his x mark,
Hoithlepovau Hauja, his x mark,
Cussetuh Haujo, his x mark,
Ochesee Tustunnuggee, his x mark,
Toosehatchee Haujo, his x mark,
Isfaune Haujo, his x mark,
Hopoithle Hopoie, his x mark,
Olohtuh Emautlan, his x mark,
Timothy Barnard,
Alexander Cornels, his x mark,
Joseph Islands, his x mark,

Interpreters: Alexander Macomb, jr., secretary to the commission; William R. Boote, captain Second Regiment Infantry; T. Blackburn, lieutenant commanding Company G; John B. Barnes, lieutenant U. S. Army; Wm. Hill, Ast. C. D.; Olohtau Haujo, his x mark; Tulmass Haujo, his x mark; Auttossee Emautlaw, his x mark.

humanity, by impostures [impostors,] denominating themselves Prophets, and by the duplicity and misrepresentation of foreign emissaries, whose governments are at war, open or understood, with the United States. Wherefore,

ART. The United States demand an equivalent for all expenses incurred in prosecuting the war to its termination, by a cession of all the territory belonging to the Creek nation within the territories of the United States lying east, south, and south-eastwardly, of a line to be run and described by persons duly authorized and appointed by the President of the United States—Beginning at a point on the eastern bank of the Coosa river, where the south boundary line of the Cherokee nation crosses the same; running from thence down the said Coosa river with its eastern bank according to its various meanders to a point one mile above the mouth of Cedar creek, at Fort Williams, thence east two miles, thence south two miles, thence west to the eastern bank of the said Coosa river, thence down the eastern bank thereof according to its various meanders to a point opposite the upper end of the great falls, (called by the natives Wautumka,) thence east from a true meridian line to a point due north of the mouth of Ofuoshee, thence south by a like meridian line to the mouth of Ofuoshee on the south side of the Tallapoosa river, thence up the same, according to its various meanders, to a point where a direct course will cross the same at the distance of ten miles from the mouth thereof, thence a direct line to the mouth of Summochico creek, which empties into the Chatahouchie river on the east side thereof below the Eufaulau town, thence east from a true meridian line to a point which shall intersect the line now dividing the lands claimed by the said Creek nation from those claimed and owned by the state of Georgia: Provided, nevertheless, that where any possession of any chief or warrior of the Creek nation, who shall have been friendly to the United States during the war, and taken an active part therein, shall be within the boundary ceded by these articles to the United States, every such person shall be en

titled to a reservation of land within the said territory of one mile square, to include his improvements as near the centre thereof as may be, which shall inure to the said chief or warrior, and his descendants, so long as he or they shall continue to occupy the same, who shall be protected by and subject to the laws of the United States; but upon the voluntary abandonment thereof, by such possessor or his descendants, the right of occupancy or possession of said lands shall devolve to the United States, and be identied with the right of property ceded hereby.

2nd. The United States will guarantee to the Creek nation, the integrity of all their territory eastwardly and northwardly of the said line to be run and described as mentioned in the first article.

3d. The United States demand, that the Creek nation abandon all communication, and cease to hold any intercourse with any British or Spanish post, garrison, or town; and that they shall not admit among them, any agent or trader, who shall not derive authority to hold commercial, or other intercourse with them, by license from the President or authorized agent of the United States.

4th. The United States demand an acknowledgment of the right to establish military posts and trading houses, and to open roads within the territory, guaranteed to the Creek nation by the second article, and a right to the free navigation of all its waters.

5th. The United States demand, that a surrender be immediately made, of all the persons and property, taken from the citizens of the United States, the friendly part of the Creek nation, the Cherokee, Chickesaw, and Choctaw nations, to the respective owners; and the United States will cause to be immediately restored to the formerly hostile Creeks, all the property taken from them since their submission, either by the United States, or by any Indian nation in amity with the United States, together with all the prisoners taken from them during the war.

6th. The United States demand the caption and surrender of all the prophets and instigators of the war, whether foreigners or natives, who have not submitted to the arms of the United States, and become parties to these articles of capitulation, if ever they shall be found within the territory guaranteed to the Creek nation by the second article.

7th. The Creek nation being reduced to extreme want, and not at present having the means of subsistance, the United States, from motives of humanity, will continue to furnish gratuitously the necessaries of life, until the crops of corn can be considered competent to yield the nation a supply, and will establish trading houses in the nation, at the discretion of the President of the United States, and at such places as he shall direct, to enable the nation, by industry and economy, to procure clothing.

8th. A permanent peace shall ensue from the date of these presents forever, between the Creek nation and the United States, and between the Creek nation and the Cherokee, Chickesaw, and Choctaw nations.

9th If in running east from the mouth of Summochico creek, it shall so happen that the settlement of the Kennards fall within the lines of the territory hereby ceded, then, and in that case, the line shall be run east on a true meridian to Kitchofoonee creek, thence down the middle of said creek to its junction with Flint River, immediately below the Oakmulgee town, thence up the middle of Flint river to a point due east of that at which the above line struck the Kitchofoonee creek, thence east to the old line herein before mentioned, to-wit: the line dividing the lands claimed by the Creek nation, from those claimed and owned by the state of Georgia.

The parties to these presents, after due consideration, for themselves and their constituents, agree to ratify and confirm the preceding articles, and constitute them the basis of a permanent peace between the two nations; and they do

hereby solemnly bind themselves, and all the parties concerned and interested, to a faithful performance of every stipulation contained therein.

In testimony whereof, they have hereunto, interchangeably, set their hands and affix their seals, the day and date above written.

Andrew Jackson, major general commanding Seventh Military District

Tustunnuggee Thlucco, speaker for the Upper Creeks, his x mark,

Micco Aupoegau of Toukaubatchee, his x mark,

Tustunnuggee Hopoiee, speaker of the Lower Creeks, his x mark,

Micco Achuee, of Cowetau, his x mark,

William McIntosh, jr., major of Cowetau, his x mark,

Tuskee Eneah, of Cussetau, his x mark,

Faue Emautla, of Cussetau, his x mark,

Toukaubatchee Tustunnuggee, of Hitchetee, his x mark,

Noble Kinnard, of Hitchetee, his x mark,

Hopoiee Hutkee, of Souwagoolo, his x mark,

Hopoiee Hutkee, for Hopoie Yoholo, of Souwogoolo, his x mark,

Folappo Haujo, of Eufaula, on Chattohochee, his x mark,

Pachee Haujo, of Apalachoocla, his x mark,

Timpoeechee Bernard, captain of Uchees, his x mark,

Uchee Micco, his x mark,

Yoholo Micco, of Kialijee, his x mark,

Socoskee Emautla, of Kialijee, his x mark,

Choochau Haujo, of Woccocoi, his x mark,

Esholoctee, of Nauchee, his x mark,

Yoholo Micco, of Tallapoosa Eufaulau, his x mark,
Stinthellis Haujo, of Abecoochee, his x mark,
Ocfuskee Yoholo, of Toutacaugee, his x mark,
John O'Kelly, of Coosa,
Eneah Thlucco, of Immookfau, his x mark.
Espokokoke Haujo, of Wewoka, his x mark,
Eneah Thlucco Hopoiee, of Talesee, his x mark,
Efau Haujo, of Puccan Tallahassee, his x mark,
Talessee Fixico, of Ocheobofau, his x mark,
Nomatlee Emautla, or captain Isaacs, of Cousoudee, his x mark,
Tuskegee Emautla, or John Carr, of Tuskegee, his x mark,
Alexander Grayson, of Hillabee, his x mark,
Lowee, of Ocmulgee, his x mark,
Nocoosee Emautla, of Chuskee Tallafau, his x mark,
Wlliam McIntosh, for Hopoiee Haujo, of Ooseoochee, his x mark,
William McIntosh, for Chehahaw, Tustunnuggee, of Chehahaw, his x mark,
William McIntosh, for Spokokee Tustunnuggee, of Otellewhoyonnee, his x mark,

(*Printer's note*: After each name appears "[L. S.]".)

Done at fort Jackson, in presence of—Charles Cassedy, acting secretary; Benjamin Hawkins, agent for Indian affairs; Return J. Meigs, A. C. nation; Robert Butler, Adjutant General U. S. Army; J. C. Warren, assistant agent for Indian affairs; George Mayfield; Alexander Curnels; George Lovett, Public interpreters.

Appendix E.

TREATY WITH THE CREEKS, 1866.

June 14, 1866; 14 Stats., 785; Ratified July 19, 1866; Proclaimed Aug. 11, 1866.

Treaty of cession and indemnity concluded at the city of Washington on the fourteenth day of June, in the year of our Lord one thousand eight hundred and sixty-six, by and between the United States, represented by Dennis N. Cooley, Commissioner of Indian Affairs, Elija Sells, superintendent of Indian affairs for the southern superintendency, and Col. Ely S. Parker, special commissioner, and the Creek Nation of Indians, represented by Ok-tars-sars-harjo, or Sands; Cow-e-to-me-co and Che-chu-chee, delegates at large, and D. N. McIntosh and James Smith, special delegates of the Southern Creeks.

* * * * * * * *

Article 2. The Creeks hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted in accordance with laws applicable to all members of said tribe, shall ever exist in said nation; and inasmuch as there are among the Creeks many persons of African descent, who have no interest in the soil, it is stipulated that hereafter these persons lawfully residing in said Creek country under their laws and usages, or who have been thus residing in said country, and may return within one year from the ratification of this treaty, and their descendants and such others of the same race as may be permitted by the laws of the said nation to settle within the limits of the jurisdiction of the Creek Nation as citizens [thereof,] shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon and give equal protection to

all such persons, and all others, of whatsoever race or color, who may be adopted as citizens or members of said tribe.

* * * * * * * *

Article 10. The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian territory: *Provided, however,* [That] said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs. The Creeks also agree that a general council, consisting of delegates elected by each nation or tribe lawfully resident within the Indian territory, may be annually convened in said territory, which council shall be organized in such manner and possess such powers as are hereinafter described.

* * * * * * * *

In testimony whereof, we, the commissioners representing the United States and the delegates representing the Creek nation, have hereunto set our hands and seals at the place and on the day and year above written.

D. N. Cooley, Commissioner of Indian Affairs. (Seal.)
Elijah Sells, Superintendent Indian Affairs. (Seal)
Ok-ta-has Harjo, his x mark. (Seal)
Cow Mikko, his x mark. (Seal)
Cotch-cho-chee, his x mark. (Seal)
D. N. McIntosh. (Seal)
James M. C. Smith. (Seal)

In the presence of—J. W. Dunn, United States Indian agent; J. Harlan, United States Indian agent; Charles E. Mix; J. M. Tebbetts; Geo. A. Reynolds, United States Indian agent; John B. Sanborn; John F. Brown, Seminole delegate; John Chupco, his x mark: Fos-har-jo, his x mark: Cho-cote-huga, his x mark; R. Fields, Cherokee delegate; Douglas H. Cooper; Wm. Penn Adair; Harry Island, his x mark, United States interpreter, Creek Nation; Suludin Watie.

Appendix F.

ACT OF JULY 22, 1790, SEC. 4; 1 Stats., 137.
C. Federal Legislation.

Section 4 of the first Indian Intercourse Act covered the sale of lands, together with other types of trade, and declared:

> That no sale of lands made by any Indians, or any nation of tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

(*Note*: Appendix F, above, was taken from Handbook of Federal Indian Law, by Felix S. Cohen, page 322.)

Appendix G.

ACT OF MARCH 1, 1793; 1 Stat., 329-330.
C. Federal Legislation.

This provision was amplified in the Second Indian Intercourse Act, approved March 1, 1793, section 8 of which provided:

> That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any

lands by them held, or claimed; *Provided, nevertheless,* That it shall be lawful for the agent or agents of any state, who may be present in any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to the lands within such state, which shall be extinguished by the treaty.

(*Note*: Appendix G, above, was taken from Handbook of Federal Indian Law, by Felix S. Cohen, page 322.)

Appendix H.

ACT OF MARCH 3, 1901; 31 Stat., 1447.

Chap. 868—An Act to amend section six, chapter one hundred and nineteen, United States Statutes at Large numbered twenty-four.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of chapter one hundred and nineteen of the United States Statutes at Large numbered twenty-four, page three hundred and ninety, is hereby amended as follows, to-wit: After the words "civilized life," in line thirteen of said section six, insert the words "and every Indian in Indian Territory."

Approved, March 3, 1901.

(*Note*: Appendix H, above, was taken from Laws Relating to Five Civilized Tribes, page 358.)

Appendix I.

ACT OF APRIL 26, 1906, SEC. 28; 34 Stat., 137.

Sec. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek,

and Seminole Tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided,* That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further,* That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

Sec. 29. That all acts and parts of acts inconsistent with the provisions of this act be, and the same are hereby, repealed.

Approved, April 26, 1906.

(*Note*: From Laws Relating to Five Civilized Tribes, page 511.)

Appendix J.

ACT OF APRIL 13, 1946; 60 Stat. 1049.
Public Law 726—79th Congress.)

(Chapter 959—2d Session.)
(H. R. 4497)

An Act to create an Indian Claims Commission to provide for the powers, duties, and functions thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created and established an Indian Claims Commission, hereafter referred to as the Commission.

Jurisdiction.

Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the na-

ture of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

Membership Appointment; Oath; Salary.

Sec. 3. (a) The Commission shall consist of a Chief Commissioner and two Associate Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate, and each of whom shall receive a salary of $10,000 per year. At all times at least two members of the Commission shall be members of the bar of the Supreme Court of the United States in good standing: *Provided further*, That not more than two of the members shall be of the same political party. Each of them shall take an oath to support the Constitution of the United States and to discharge faithfully the duties of his office.

Term of Office; Vacancies; Removal.

(b) The Commissioners shall hold office during their good behavior until the dissolution of the Commission as

hereinafter provided. Vacancies shall be filled in the same manner as the original appointments. Members of the Commission may be removed by the President for cause after notice and opportunity to be heard.

Not to Engage in Other Vocations or Represent Tribes.

(c) No Commissioner shall engage in any other business, vocation, or employment during his term of office nor shall he, during his term of office or for a period of two years thereafter, represent any Indian tribe, band, or group in any matter whatsoever, or have any financial interest in the outcome of any tribal claim. Any person violating the provisions of this subdivision shall be fined not more than $10,000 or imprisoned not more than two years, or both

Quorum.

(d) Two members shall constitute a quorum, and the agreement of two members shall be necessary to any and all determinations for the transaction of the business of the Commission, and, if there be a quorum, no vacancy shall impair or affect the business of the Commission, or its determinations.

Staff of Commission.

Sec. 4. The Commission shall appoint a clerk and such other employees as shall be requisite to conduct the business of the Commission. All such employees shall take oath for the faithful discharge of their duties and shall be under the direction of the Commission in the performance thereof.

Offices.

Sec. 5. The principal office of the Commission shall be in the District of Columbia.

Expenses of Commission.

Sec. 6. All necessary expenses of the Commission shall be paid on the presentation of itemized vouchers therefor approved by the Chief Commissioner or other member or officer designated by the Commission.

Limitations.

SEC. 23. The Commission shall receive claims for a period of five years after the date of the approval of this Act and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration nor will any claim thereafter be entertained by the Congress.

Notice and Investigation.

SEC. 24. (a) As soon as practicable the Commission shall send a written explanation of the provisions of this Act to the recognized head of each Indian tribe and band, and to any other identifiable groups of American Indians existing as distinct entities, residing within the territorial limits of the United States and Alaska, and to the superintendents of all Indian agencies, who shall promulgate the same, and shall request that a detailed statement of all claims to be filed by the Commission, together with the names of any or certain Indians from whom depositions should be taken immediately and a summary of their proposed testimonies.

(b) The Commission shall establish an Investigation Division to investigate all claims referred to it by the Commission for the purpose of discovering the facts relating thereto. The Division shall make a complete and thorough search for all evidence affecting each claim, utilizing all documents and records in the possession of the Court of Claims and the several Government departments, and shall submit such evidence to the Commission. The Division shall make available to the Indians concerned and to any interested Federal agency any data in its possession relating to the merits and claims of any Indian.

Calls From Departments for Information.

SEC. 25. The Commission shall have the power to call

upon any of the departments of the Government for any information it may deem necessary, and shall have the use of all records, hearings, and reports made by the committees of each House of Congress, when deemed necessary in the prosecution of its business.

At any hearing held hereunder, any official letter, paper, document, map, or record in the possession of any officer or department, or court of the United States or committee of Congress (or a certified copy thereof), may be used in evidence insofar as relevant and material, including any deposition or other testimony of record in any suit or proceeding in any court of the United States to which an Indian or Indian tribe or group was a party, and the appropriate department of the Government of the United States shall give to the attorneys for all tribes or groups full and free access to such letters, papers, documents, maps, or records as may be useful to said attorneys in the preparation of any claim instituted hereunder, and shall afford facilities for the examination of the same and, upon written request by said attorneys, shall furnish certified copies thereof.

Representation by Attorneys.

Sec. 15. Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, of its own selection, whose practice before the Commission shall be regulated by its adopted procedure. The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case,

plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any case. The attorney or attorneys for any such tribe, band, or group as shall have been organized pursuant to section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U. S. C., sec. 476), shall be selected pursuant to the constitution and by-laws of such tribe, band, or group. The employment of attorneys for all other claimants shall be subject to the provisions of sections 2103 to 2106, inclusive, of the Revised Statutes (25 U. S. C., secs. 81, 82-84).

The Attorney General or his assistants shall represent the United States in all claims presented to the Commission, and shall have authority, with the approval of the Commission, to compromise any claim presented to the Commission. Any such compromise shall be submitted by the Commission to the Congress as a part of its report as provided in section 21 hereof in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 22 hereof.

No Member of Congress to Practice Before Commission.

Sec. 16. No Senator or Member of or Delegate to Congress shall, during his continuance in office, practice before the Commission.

Hearing.

Sec. 17. The Commission shall give reasonable notice to the interested parties and an opportunity for them to be heard and to present evidence before making any final determination upon any claim. Hearings may be held in any part of the United States or in the Territory of Alaska.

Testimony.

Sec. 18. Any member of the Commission or any employee of the Commission, designated in writing for the purpose by the Chief Commissioner, may administer oaths

and examine witnesses. Any member of the Commission may require by subpena (1) the attendance and testimony of witnesses, and the production of all necessary books, papers, documents, correspondence, and other evidence, from any place in the United States or Alaska at any designated place of hearing; or (2) the taking of depositions before any designated individual competent to administer oaths under the laws of the United States or of any State or Territory. In the case of a deposition, the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall be subscribed by the deponent. In taking testimony, opportunity shall be given for cross-examination, under such regulations as the Commission may prescribe. Witnesses subpenaed to testify or whose depositions are taken pursuant to this Act, and the officers or persons taking the same, shall severally be entitled to the same fees and mileage as are paid for like services in the courts of the United States.

Final Determination.

Sec. 19. The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include (1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; (b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement of its reasons for its findings and conclusions.

Review by Court of Claims.

Sec. 20. (a) In considering any claim the Commission at any time may certify to the Court of Claims any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the claim; and thereupon the Court of Claims may give appropriate instructions on the questions certified and transmit the same to the Commission for its guidance in the further consideration of the claim.

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law including any conclusions respecting "fair and honorable dealings," where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U. S. C., sec. 288), as amended.

Report of Commission to Congress.

Sec. 21. In each claim, after the proceedings have been finally concluded, the Commission shall promptly submit its report to Congress.

The report to Congress shall contain (1) the final deter-

mination of the Commission; (2) a transcript of the proceedings or judgment upon review, if any, with the instructions of the Court of Claims; and (3) a statement of how each Commissioner voted upon the final determination of the claim.

Effect of Final Determination of Commission.

Sec. 22. (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all daims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

Dissolution of the Commission.

Sec. 23. The existence of the Commission shall terminate at the end of ten years after the first meeting of the Commission or at such earlier time after the expiration of the five-year period of limitation set forth in section 12 hereof as the Commission shall have made its final report to Congress on all claims filed with it. Upon its dissolution the records of the Commission shall be delivered to the Archivist of the United States.

Future Indian Claims.

Sec. 24. The jurisdiction of the Court of Claims is hereby extended to any claim against the United States accruing after the date of the approval of this Act in favor of any Indian tribe, land, or other identifiable group of American Indians residing within the territorial limits of

the United States or Alaska whenever such claim is one arising under the Constitution, laws, treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band, or group. In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, and to the same offsets, counterclaims, and demands, as in cases brought in the Court of Claims under under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C., sec. 250), as amended: *Provided, however,* That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups.

Effect on Existing Laws.

Sec. 25. All provisions of law inconsistent with this Act are hereby repealed to the extent of such inconsistency, except that existing provisions of law authorizing suits in the Court of Claims by particular tribes, bands, or groups of Indians and governing the conduct or determination of such suits shall continue to apply to any case heretofore or hereafter instituted thereunder save as provided by section 11 hereof as to the deduction of payments, offsets, counterclaims, and demands.

Sec. 26. If any provision of this Act, or the application thereof, is held invalid, the remainder of the Act, or other applications of such provisions, shall not be affected.

Approved August 13, 1946.

Appendix K.

BEFORE THE INDIAN CLAIMS COMMISSION

The Creek Nation, Petitioner, v. The United States, Defendant.—Docket No. 21.

OPINION OF COMMISSION.

Per Curiam. On January 5, 1951, a group of Creek Indians, designated as the "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida," filed a motion in the above-entitled cause for leave to file a petition of intervention, which accompanied the motion. Thereafter, and on April 4, 1951, the same petitioners, who will hereafter be referred to as the Perdido Band, filed an amended motion accompanied by another, considerably changed petition of intervention, and a hearing was had on the amended motion and the petition attached thereto, on April 18, 1951.

The Perdido Band, according to the statements contained in the amended motion and the petition accompanying it, is composed of descendants of members of the Creek Nation of Indians who remained in Alabama, Georgia and North Florida under the treaties of January 4, 1826 and March 24, 1832, between the United States and the Creek Nation. Neither the petitioner, the Creek Nation, nor defendant denies these statements.

The petition of intervention also states that enrollment in the Perdido Band is limited to those Indians who are descendants of members of the original Creek Nation, and this allegation is not questioned.

The Perdido Band is not asking for an award independently of that sought in the above case; on the contrary, they are supporting the pending claim. What they are demanding is that they and all other descendants of members of the original Creek Nation be recognized as having the right to participate in any award that might be made in the above case even though they are not enrolled as members of the petitioner, Creek Nation, as now constituted.

Without going into the history of the Creek Nation in much detail, it may be stated that this tribe was one of the larger Indian tribes and originally occupied a large territory in Georgia, Alabama and Florida. On January 24, 1826, 7 Stat. 286, the Creek Nation concluded a treaty with the United States by which it ceded an area of its domain located in Georgia and lying on the east side of the Chattahoochee river. A portion of the tribe wished to move west of the Mississippi river and the treaty provided (Art. 6) for a "deputation of five persons" to select a country west of the river as a home for that part of the Creek Nation desiring to move west. The country was selected and the selection confirmed by treaty, as will be shown later. Treaty of Febr. 14, 1833, 7 Stat. 417.

On March 24, 1832, 7 Stat. 366, by treaty of that date, the Creeks ceded "all their land, East of the Mississippi river" to the United States. This treaty contained this provision (Art. XII):

> "The United States are desirous that the Creeks should remove to the country west of the Mississippi, and join their countrymen there; and for this purpose it is agreed, that as fast as the Creeks are prepared to emigrate, they shall be removed at the expense of the United States, and shall receive subsistence while upon the journey, and for one year after their arrival at their new homes—Provided however, *that this article shall not be construed so as to compel any Creek Indian to emigrate, but they shall be free to go or stay, as they please.*" (Italics added.)

Article II thereof required the United States to survey the ceded area and allowed "ninety principal chiefs of the Creek tribe to select one section each, and every other head of a Creek family to select one half section each, which tracts shall be reserved from sale for their use for a term of five years, unless sooner disposed of by them." Provisions were also made for taking a census of the persons making selections and for making selection of twenty sections for

the benefit of orphan children of the Creeks. Article III authorized the sale of the selections, and Article IV provided:

> "At the end of five years, all the Creeks entitled to these selections, and desirous of remaining, shall receive patents therefor in fee simple, from the United States."

Article XII of this treaty quoted above discloses the desire of the United States to move all Creeks west of the Mississippi river, and as an inducement to move, agreed to pay the expenses of removal, provide subsistence during removal and for a year after their arrival west. However, such removal was not compulsory as to individual Creeks, for the article, as shown above, contained the proviso "that this article shall not be construed so as to compel any Creek to emigrate, but they shall be free to go or stay, as they please."

The treaty of Febr. 14, 1833, 7 Stat. 417, confirmed the selection of land authorized by the 1826 treaty (Art. VIII), and Article III thereof provided for a patent in fee simple to be issued to the "Creek Nation." Article IV made it unmistakably clear that the land ceded under this treaty in what is now Oklahoma was for the benefit and use of the entire Creek people, for it provided:

> "It is hereby mutually understood and agreed between the parties to this treaty that the land assigned to the Muskogee Indians, by the second article thereof, shall be taken and considered the property of the whole Muskogee or Creek nation, as well of those now residing upon the land, as the great body of said nation who still remain on the east side of the Mississippi; and it is also understood and agreed that the Seminole Indians of Florida, whose removal to this country is provided for by their treaty with the U. S. dated May 9th, 1832, shall also have a permanent and comfortable home on the lands hereby set apart as the country of the Creek nation; and they (the Seminoles) will hereafter

be considered a constituent part of said nation, but are to be located on some part of the Creek country by themselves—which location will be selected for them by the commissioners who have signed these articles of agreement or convention." (II Kapp. 390.)

The 1826 treaty did not, at least by its terms, contemplate a removal of the entire tribe west, but the 1832 treaty discloses a purpose to recognize those who migrated to the west as the main governing body of the tribe since provision was made for enabling individual chiefs and heads of families wishing to do so to remain east and select tracts in their aboriginal land which was reserved for that purpose in said treaty of 1832. This purpose was confirmed by the treaty of 1833, which was made with the Creek Nation at Fort Gibson in Indian Territory, and in which the territory ceded by the United States was assigned to the whole Muskogee or Creek Nation—those residing east and those residing west of the Mississippi. Thereafter, all dealings of the Federal Government were made with the Creeks in Oklahoma, and we find no treaties, contracts or other transactions with those members of the tribe who remained east, or that defendant ever recognized those remaining east as the Creek Nation.

There are other instances by which the United States recognized the tribal government of the Creeks in Oklahoma, notably the Act of April 26, 1906, 34 Stat. 137, section 28 of which "continued in full force and effect for all purposes, authorized by law" the Creek tribal government. We are of the opinion the petitioner in this case has the exclusive right to prosecute the claim here asserted. In fact the Perdido Band does not really question the right of petitioner to maintain the action, for, as before stated, it asked that the members of the Creek Nation be awarded the amount prayed for, insisting, however, that the award be for the benefit of all Creek descendants and not confined to those enrolled under the various agreements with the Creek Nation, confirmed by Acts of Congress.

This Commission decided in the Loyal Creek case, Docket No. 1, and the Western Cherokee case, Docket No. 24, that an "identifiable group," under the Indian Claims Commission Act, must have a common claim, and that a common suit for individual claims does not create an identifiable group. It is plain from the statements in the amended motion and the allegations of the petition accompanying it that the Perdido Band has no common claim, and is therefore not an "identifiable group" under said Act.

Furthermore, the Perdido Band is in reality asking us to determine the individual Indians who may participate in any award that may be made. They pray in their petition that the members of the Perdido Band be declared entitled to share in the recovery or that a Commission be created to make a roll of the living descendants of the original Creek Nation in order to determine who shall be entitled to share in any recovery. Counsel for applicants mistake the powers of the Indian Claims Commission. The Act authorizes us to determine claims of Indian tribes, bands or identifiable groups. We have no power to determine the membership of the groups who may successfully prosecute their claims, for that is an administrative function over which we have no control.

For the reasons stated above, the amended motion of the Perdido Band must be denied.

The Commission now has under advisement for decision only the issue of fact and law relating to the petitioner's right to recover. (Sec. 22(5) of Rules of Procedure.) Ordinarily, we would postpone the determination of the amended motion of the Perdido Band until after we had determined that issue, but for fear longer delay might cause embarrassment to the Band because of the expiration of the time for filing claims on August 13, 1951, we concluded an earlier determination of the amended motion proper.

Dated this 4th day of June, 1951.

Appendix L.

Docket No. 21.

(Caption omitted.)

Decided April 22, 1952.

OPINION OF THE COMMISSION.

Witt, Chief Commission, delivered the opinion of the Commission.

The petitioner seeks judgment against the defendant in the sum of $29,084,500 with interest at the rate of five per cent per annum thereon from August 9, 1814 for the lands it ceded to the United States by treaty of that date; or, in the alternative, that it have judgment for the total sum the United States received from the sale of said lands, together with interest at five per cent per annum on the proceeds of said sales from the dates they were consummated. Petitioner contends that the lands involved comprise an acreage of 23,267,600 acres of a minimum value at the date of the cession of $1.25 per acre; that said cession was forced, executed under duress, and no compensation was paid petitioner for the lands therein ceded of which they had Indian title; that no compensation at any time has been received by petitioner for said lands.

The defendant contends that a state of war had existed between the United States and the Creek Nation during the period 1812 to August 9, 1814, and that the treaty of August 9, 1814 was a treaty of capitulation, and that therefore the acreage acquired by the United States thereunder was the result of conquest and for which no liability for compensation was incurred to the petitioner. The defendant further contends that under the treaty of August 7, 1856, executed between the Creek Nation and the defendant, the Creek Nation released any claim against the United States by reason of the treaty of August 9, 1814 if any existed, and subsequently, by agreement of March 1, 1889 again released any claim it might have by reason of the

treaty of August 9, 1814; that therefore, if any liability had ever existed by reason of the treaty of August 9, 1814, same was released and extinguished by reason of the treaties of August 7, 1856, and the agreement entered into between the parties of date March 1, 1889.

In no event could there be any consideration due the petitioner based on the treaty of August 9, 1814 (which we will hereafter refer to as the Jackson treaty) unless the lands described therein belonged to the Creek Nation; therefore, this question will first be discussed.

The record as to the extent of the territory ceded by the Jackson treaty is confusing, the treaty describing said land ceded as being "all the territory belonging to the Creek Nation within the territories of the United States lying west, south and eastwardly of the line," which line is made to begin "at a point on the eastern bank of the Coosa River" some distance north of Fort Williams. (Fort Williams is a short distance north of the 33rd parallel) and proceeds south and southeastwardly along the lines of the Coosa River to the Tallapoosa River, and thence to the Chattahouchee, and thence in a straight east line toward the Atlantic coast, to the then western boundary of lands to which Indian title had been extinguished.

As to the northern, western and southern boundaries, there are differences of opinion, and these differences result in varying proofs of total acreage. The petitioner, by requested finding No. 54, claims the acreage of the cession to be a total of 25,936,901 acres—17,917,391 in Alabama; 406,710 in Mississippi; and 7,612,800 in Georgia. This acreage it claims to be established by claimant's Exhibits Nos. 1 and 40. The Indian Office finds the acreage to be 21,769,600 (Cl. Ex. 31).

There are some conflicting claims on the part of the Choctaws, Chickasaws and Cherokees as to the dividing line between their holdings and those of the Creeks to the north and west; however, it seems pretty generally agreed that the western line of the Creek territory was neither the

Tombigbee River nor the Alabama River, nor the watershed between these two rivers. Moyos substantially follows the watershed between these two rivers in fixing the western boundary of Plat 75 (which he determines the Jackson Treaty cession to be). The beginning of hostilities between the hostile Creeks and the loyal Creeks was in southwestern Alabama along the eastern banks of the Tombigbee River, which would indicate the Creeks to be in possession then of a large portion of what appears on Royce's Map to be Plats 61 and 82; however, the area of 61 had been ceded by the Chickasaws to the United States on November 16, 1805, and the area of Plat 82 were ceded by the Choctaws on November 24, 1816. The record indicates, however, that the cession of the Choctaws of Plat 82 and of Plat 80 were more in the nature of quitclaims then of recognized ownership, but granting the claims of the Choctaws, Chickasaws and Cherokees as good, the southern part of the western boundary of the Creeks would practically follow the watershed between the Alabama and Tombigbee Rivers, although there are evidences of occupancy by the Creeks further west. One of the first battles of this war was at Fort Mims, which is at or near the confluence of the Alabams and Tombigbee Rivers and on the west side of the Alabams River. The beginning of the hostilities, however, was known as the Battle of Burnt Corn shortly prior to the Fort Mims massacre, and the ending of hostilities in that section was by the battle known as that of Holy Ground, all in southwestern Alabama near the confluence of the Alabama and Tombigbee Rivers. Holy Ground was called the Creek capitol at the time and was located at a point on the east bank of the Alabama River about 35 miles north of Fort Mims, this territory being said by Governor Clay at the time to be the best of the enemy's country. (Rowland's Andrew Jackson, pp. 84-93: 167-182). In this history of these battles Rowland frequently refers to this territory as being the east boundary of the Choctaw and Chickasaw lands. For the protection of this territory some twenty-odd forts were

constructed along the Tombigbee and Alabama Rivers. (Rowland, pp. 84-93).

As to the southern boundary, in a treaty between Governor Oglethorpe of Georgia and the Creeks, Cherokees and Chickasaws, on August 21, 1739, it was declared

> "* * * the lands between the Savannah and St. John's Rivers, * * * and from the St. John's River to the Apalachio Bay, and thence to the mountains, do, by ancient right belong to the Creek Nation * * *"

In his testimony, Dr. Jno. R. Swanton (a *witness for the defendant*), stated that the Creeks occupied and controlled the lands all the way from the Tennessee River to Florida and to the Tombigbee River on the west.

As to the north boundary, it is fixed in Claimant's Exhibit No. 1 and Defendant's Exhibit No. 55 as that fixed by the treaty of Cherokees on March 22, 1816, which is the south line of the Royce Plat No. 79. There seems no doubt that the Creeks occupied lands even further north, probably to the Tennessee River, however, no claim is now being made by the Creeks for the lands north of the south line of plat 79.

The difference in the acreage as shown by Royce (Plat 75) and that claimed by the petitioner, based on Claimant's Exhibit No. 1, is approximately 4,337,000 acres.

The defendant in its brief (p. 114) refers to Dr. Swanton as being "beyond any doubt the leading authority, living or dead, on the Creek Indians, and we might add, his integrity is unimpeachable." Dr. Swanton testified that the Creeks occupied the territory from the Tennessee River on the north to Florida on the south, and to the Tombigbee River on the west. His answer to inquiry by the defendant as to whether or not they occupied the described territory (referring to Plat 75 of Royce) was "Yes, practically all that territory." He also testified that they occupied Plat No. 82 on the west of 75 and that he did not know of any Choctaw settlements east of the Tombigbee River. There

was much other testimony in the record to the effect that the Creeks occupied territory to the Tombigbee.

While defendant, in its original answer, alleges "that at the time said treaty of August 9, 1814 was made, the lands involved were unsurveyed, the boundaries were indefinite, and the title, if any, of the Creek Nation was doubtful,"—it made no request for a finding of fact that the petitioner did not own the lands involved in the claim. The only finding requested with reference to the ownership of said land is requested finding No. 14, as follows:

> "The lands embraced in said cession were situated in the states of Alabama, Georgia and probably Mississippi, and contained an area of approximately from 21,284,800 to 25,936,901 acres. The Commission further finds that the lands used and occupied by the Creek Indians in 1814 to the exclusion of other Indian tribes, constituted communal property and belonged to the Creek Nation."

Defendant, in its brief, says

> "Defendant does not dispute that the Creek Nation had Indian title to a large area of land in Alabama and Georgia but the exact location of the area and the acreage therein is a matter to be determined in the event that Commission adjudges the defendant liable for the value of the lands ceded under the treaty of 1814.
>
> "The acreage of the cession and the ownership of the lands can be determined with a high accuracy.* * *"

Dr. Swanton, the defendant's witness gave the following testimony in response to the following question:

> "Q. Doctor, I will ask you if the lands that were ceded under the Treaty of 1814 belonged to the Creek Nation, the Upper Creeks or the Lower Creeks?
>
> "A. The Creek Nation. Of course, the lands, you understand, nearer the two divisions were considered

to be of more particular interest to the division concerned, but the lands were recognized as Creek lands."

Supplementing the historical information as to the use and occupancy of the territory as hereinabove outlined, from the activities during the Creek hostilities in 1812, and the years following, it seems certain that at the time Creeks were very numerous in southwestern Alabama to the Florida line—in fact, south of the Florida line almost to Pensacola.

Jackson's activities in this war began in October 1813, and his first act was the building of Fort Deposit which is on the Tennessee River. This would indicate that that was the north frontier of the Creek occupany.

Accompanying the "Early History of the Creek Indians and Their Neighbors" by John R. Swanton, being Bulletin 73 of the Bureau of American Ethnology, are a number of maps compiled by him, among them being Plat 2, denominated "Territory of the States of Georgia and Alabama," illustrating the geographical distribution and movements of the tribes and towns of the Creek Confederacy. It is somewhat difficult to determine the dates of the settlements depicted—however, settlements of Creek and other tribes and towns of the Creek Confederacy are shown at some time to have been as far north as the Tennessee River, as far west as the Tombigbee River, also practically to the mouth of the Tombigbee and the Alabama, and extending along the Alabama to its source—very numerous in the territory drained by the Coosa and Tallapoosa, and especially the territory between these two rivers and at the point of their junction. Rowland claims that the Alibamos (a Creek tribe) occupied and claimed the land lying along the east bank of the Tombigbee River.

The Treaty of August 9, 1814.

The next question arising is whether or not the treaty of August 9, 1814 was a treaty of capitulation as the result of war between the United States and the Creek Nation

and the lands acquired by the United States by reason thereof, and became an acquisition as a result of conquest or indemnification for war costs.

Petitioner contends that the hostilities between the United States and the Creeks did not constitute a war between the United States and the Creek Nation, but war between a faction of the members of the Creek Nation, which the nation was unable to control, and the United States; that the Creek Nation, as a nation, was never at war with the United States, and that therefore the United States had no legal right to penalize the nation, as a nation, by the exaction of an indemnity; and that in any event the value of the land ceded were far in excess of any indemnity to which the United States might have been entitled even had the war been one between the two nations. The defendant contends that the cession was a result of the conquest by the United States as a result of the war between the United States and the Creek Nation, and that the lands ceded were indemnity for the cost of the war.

It is undisputed that the governing authorities of the Creek Nation never authorized hostilities on the part of any members of the tribe against the United States; that these hostilities were brought about by a few chiefs who were hostile toward the United States, and over the protests of the constituted authorities of the Creek Nation; that in the beginning these hostilities were in the nature of a rebellion by factions of the Creek tribe against the constituted authorities of the tribe because of the loyalty of the constituted authorities to the United States. Many of the chiefs of the tribe were executed because of their loyalty to the United States. When the soldiers of the United States ultimately entered the hostilities against the warring Creeks, these hostile Creeks were able to enlist the support of many Creek Warriors. The evidence as to whether or not a majority of the members of the nation participated in hostilities against the United States is conflicting, but at no time did the constituted authorities

of the Creek Nation authorize hostilities against the United States or officially direct or approve such hostilities. On the contrary, they were loyal to the United States and many Creek warriors served in the United States armies.

Under all the authorities, therefore, it seems that it cannot be said that the Creek Nation, as a nation, was at war with the United States. Under the applicable principles of international law, a nation, as a nation, is not responsible for the acts of bands or groups in hostility or rebellion against it, or against another nation with which it is in amity, if the nation to which these bands or groups are a part is unable to control the actions of such warring or rebellious groups. In support of its contention that the Creek Nation and the United States were at war with each other, the defendant cites the case of Marks, et al., v. The United States, 28 C. Cls. 141, affirmed by 161 U. S. 297, which holds that no formal declaration of war is necessary to constitute an Indian war with the United States; that it is sufficient that hostilities exist beween the two and military operations are carried on. While the facts involved in the case cited do not show that the authorities of the Indian tribes (the Bannock and Piute tribes) had actually declared war against the United States or against the whites, the opinion says that all reports "establish the condition of actual war so far as that condition can exist between a small tribe of Indians and the United States." The facts of the case clearly indicate *a united tribe,* engaged in hostilities against the United States, and that therefore a state of war then existed. The Supreme Court in affirming the decision of the trial court that a state of war existed, did so with the statement: "* * * *the tribe, as a tribe,* was engaged in actual hostilities with the United States" (emphasis supplied), *the tribe* was not then in amity with the United States. The decision in the Marks case is that when the Indian tribe, *as a tribe, is in a state of hostility* with the Creek Nation and the United States that *a state of war exists.* Certainly this was not the situation with the Creek

Nation and the United States, therefore, it is the opinion of this Commission that a state of war between the United States and the Creek Nation did not exist.

It is also contended by the petitioner that the relationship between the United States and the Creek Nation was not that of the United States and a foreign nation—that the status of an Indian tribe is not that of a foreign nation. It would seem unnecessary to consider the distinction attempted to be made by the petitioner in this respect in view of our determination that a state of war did not exist between the Creek Nation and the United States.

Having determined that a state of war did not exist, then the question arises as to the right of the United States to require the cession of land made by the treaty of August, 1814, or any cession of land, as an indemnity. Authorities establish as a settled principle of international law "that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection." That the constituted leaders of the Creek Nation made every effort within their power to prevent the insurrection and to suppress it seems undisputed. Therefore, the United States was not legally entitled to indemnity from the Creek Nation because of the hostilities which it could not prevent.

Defendant admits "that a certain degree of compulsion was used in obtaining" this treaty. It is undisputed that General Jackson told the assembled chiefs and council members that they could sign the treaty as prepared by him (which ceded between 20,000,000 and 25,000,000 acres of lands to the defendant) or they could start marching toward the Seminoles and the British in Florida, and he would follow and drive them into the Atlantic Ocean. To say that "a certain degree of compulsion was used," (as defendant does in its brief) is stating the case rather mildly. Without any doubt the execution of the treaty involved was secured at the point of the bayonet.

Revision of Treaty Because of Duress.

There may be some doubt as to whether the treaty is a complete nullity because the United States was not entitled to indemnity as a result of war, or whether it should be considered as revised because of duress. At the time of the execution of this treaty the friendly chiefs of the Creek Nation executed the same under protest, and at the same time executed what they denominated as their part of the treaty—a statement which was to accompany the treaty when forwarded to the Government by General Jackson. This statement appears as Finding of Fact No. 28. In this statement there is a practical admission of the justice and right of General Jackson to take territory previously occupied by the hostile Creeks, but protested the taking of lands claimed to be occupied by the friendly Creeks. It would seem, therefore, that the treaty, if considered as revised to the extent of eliminating therefrom the cession of lands claimed as occupied exclusively by the friendly Creeks, it would have been acceptable to the Creek Nation, and the signers thereof, at the time of its execution. The said lands included, as to which there was serious protest at the time and for which compensation has been repeatedly sought of the defendant, are the 7,084,800 acres, the southern part of the cession in Georgia, and the cession of the lands in southeastern Alabama, a total area of 8,849,940 acres, which was claimed to have been occupied in Indian fashion by the Loyal Creeks, and whose ownership of same by the friendly Creeks was admitted by Indian Commissioner Lea in 1853. The remainder of the cession was largely occupied by the hostiles, and the signers of the treaty seemed to be willing to its cession as a proper penalty for the nation to pay for the wrongful acts of the hostile Creeks. In this connection it may be noted that General Jackson did not pretend at the time that he was taking this land in southeastern Alabama and Georgia that it was "conquered territory." In his letter to the Secretary of War dated August 10, 1814, accompanying the treaty, re-

ferring to the southeastern Alabama and Georgia lands, he said: "Consideration interesting to the United States, relative to the Spanish dominions immediately south of us, induced me to procure the cession of all the Creek lands of consequence, bounding on foreign claims of territory, in order to prevent future connexions injurious to our tranquillity."

While there is no evidence in the record as to the value of any of the lands involved in the cession, and practically none as to the expense of the United States by reason of the Creek war, it would seem probable that the lands ceded (approximately 15 to 19 million acres) in excess of the 8,849,940 acres in Georgia and southeastern Alabama would be considered as a proper indemnification for the cost of the war, if the defendant is entitled to any indemnification. And whether legally entitled to indemnification or not, the friendly chiefs of the Creek Nation seemingly were agreeable to the ceding of the lands occupied by the hostiles, on account of the cost of this war to the United States by reason of the fact that the participation of the United States therein was protection of the loyal friendly Creeks who, but for the help of the defendant, would probably have been exterminated by the hostile members of the tribe.

The determination of the liability of the defendant by reason of the involved questions of fact and law coming on at this late date presents to this Commission a situation somewhat comparable to that presented to the courts in the case of Choctaw Nation v. United States, 119 U. S. 1. The Supreme Court in that case affirmed the award made by the United States Senate to whom the controversies had been referred by agreement of the parties. The jurisdictional act under which that litigation was had gave to the courts jurisdiction to "try all questions of difference *arising out of treaty stipulations* with the Choctaw Nation * * *." (Emphasis supplied.)

In the Supreme Court's opinion it is stated:

"The questions of difference between the United

States and the petitioner, it was alleged, resulted from the nonperformance and nonfulfillment by the United States of the obligations assumed by it under various treaties * * *."

The claims were very involved, covering many transactions and over many years of dealings. The opinion discusses at considerable length the relationship of the parties, stating that the Choctaw Nation

"stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States * * *."

Elsewhere in the opinion the court quoted from the opinion in United States vs. Kagame, 118 U. S. 375, with approval as follows:

"These Indian Tribes *are* the wards of the Nation; they are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights * * *."

Elsewhere the following language appears:

"The recognized relation between the parties to this controversy, therefore, is, that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to

technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

"The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw Nation, holding such a relation, the assumptions of fact and of right which they presuppose, the acts and conduct of the parties under them, which constitute the material for settling the controversies which have arisen under them."

After reviewing the various controversies involved in the litigation, the court finally approved the method adopted by the United States Senate, to which, so stated, these controversies had been referred for adjudication, and approved the language found in the award of the Senate as follows:

"It being thus impossible (because of the many complicated transactions between the Tribe and the Nation that were involved in the controversy) to ascertain to how much the Choctaws would be entitled, as a fair and liberal settlement, for the damage and loss sustained by them, (by reason of treaty violations) it seems to the committee that the *only practical mode of adjustment* is to give them the net proceeds of their lands, *not on the ground that the letter of the Treaty entitles them to it, but that it is the only course by which justice can now be done them.*" (The language in the above parentheses and the emphasis being supplied.)

In the instant case it appears to the Commission that in view of all the facts and circumstances hereinbefore set

forth surrounding the obtaining of the cession under the Jackson Treaty, the plaintiff should be granted some fair measure of relief, and we are of the opinion that on the broad principles of equity and justice plaintiff is entitled to an award for the amount of $1,769,940, as asserted by it in 1856, which we believe affords a fair and reasonable measure of compensation to the plaintiff.

The Release of 1856.

The defendant urges that the general release contained in the treaty of 1856 is a discharge of the defendant's liability on this claim. Petitioner admits that this defense would be good if the claim were being urged as a legal liability of the defendant, but being urged under clauses 3 and 5 of the Indian Claims Commission Act, the release is not a bar; that the consideration given for the release was unconscionable and therefore same is not a discharge of the claim.

The negotiations between petitioner and the defendant resulting in the execution of this release, show that the petitioner was asserting against the defendant 9 claims aggregating a total of approximately $3,700,000, Claim 1 being for 8,849,940 acres of land ceded in 1814 treaty at 20 cents per acre, in the amount of $1,769,940.

The Commissioner of Indian Affairs with whom the negotiations were being had denied any liability on the 1814 Jackson treaty land claim and expressed himself as thinking that all the claims were of little merit. In his letter transmitting the treaty settling the claims to the Secretary of the Interior, the Commissioner says:

> "I examined the subject thoroughly and arrived at the conclusion that the pretensions and claims of both delegations (the Creeks and the Seminoles) were generally not well founded."

The treaty which contains the release involved also provides for the cession of 2,037,414.62 acres of Creek lands in the present State of Oklahoma. The total consideration

received by the Creeks for the cession of this land and the release of all claims was $1,000,000. The information provided in the record as to the value of this land is convincing that the land at the time of its cession was of greater value than the $1,000,000 paid, and that therefore there was really no consideration received by the Creeks for the release of the Jackson treaty land claim. The defendant in its brief says:

> "The evidence definitely establishes that the original offer (of $7,000,000) was increased $3,000,000 (i. e., to $1,000,000) solely and only for the purpose of making a final adjustment, settlement and compromise of the claim now asserted by the petitioner."

If this be conceded and the land involved recognized as being worth the 20 cents per acre then asserted, the result would be the settlement of the claim of $1,769,940 for $300,000, which, under the previous holdings of the courts and of this Commission would be unconscionable.

On the ground that said consideration was unconscionable, if for no other reason, the release should be held as no bar to the claim herein asserted.

The release might well be held ineffective because of the disparity of position of the parties and of the fiduciary relationship existing calling for the most exacting fairness in their mutual dealings.

The Release of 1889.

In negotiations resulting in this release, the Fort Jackson treaty lands were not discussed, and it is not thought that this release could be seriously urged as a bar to the claim.

In the negotiations preliminary to the treaty of 1856 the petitioner asserted a claim in the amount of $1,769,940 for the 8,849,940 acres of land, for which this Commission has decided that petitioner is entitled to an award, and that values approved by the then Commissioner of Indian Affairs and by the Secretary of the Interior.

Award.

Wherefore, this Commission finds that the petitioner is entitled to an award in the sum of $1,769,940, less such offsets, if any, as may hereafter be allowed in accordance with Sec. 12 of the General Rules of Procedure of this Commission.

Edgar E. Witt, Chief Commissioner.

Commissioner Holt concurs: Wm. M. Holt, Associate Commissioner O'Marr dissents; Louis J. O'Marr, Associate Commissioner.

Appendix M.

(Caption omitted.)

Decided: May 5, 1955.

OPINION OF THE COMMISSION.

Witt, Chief Commissioner, delivered the opinion of the Commission.

Interlocutory judgment for petitioner, the Creek Nation, was rendered by this Commission on April 22, 1952. Previous to the rendition of said judgment the Commission had denied a motion of the Creek Nation East to intervene in said cause and an appeal to the Court of Claims had been taken by said intervenor to said action of this Commission; and the Court of Claims reversed the decision of the Indian Claims Commission and held that the motion to intervene should have been allowed. Said case of said intervenor was remanded to this Commission for proceedings in accordance with the decision of the Court of Claims reversing the decision of the Indian Claims Commission in denying said intervention.

Subsequent to said decision of the Court of Claims, on the 21st day of December, 1953, this Commission entered an order allowing the intervention of the said Creek Nation

East of the Mississippi, said order providing, however, that all the evidence theretofore introduced should be considered as evidence in the further trial of said Docket 21; and on said date this Commission also ordered that said cause be reopened for such further evidence as the defendant and the intervenor might desire to offer in said cause.

Thereafter further evidence was introduced and the intervenor introduced the Treaty of Ghent entered into between Great Britain and the United States, being the treaty ending what was called the War of 1812 between the United States and Great Britain, and asserted that Article IX of said treaty required the United States to return to the Creek Nation the lands that had been ceded to the United States by said Nation by the Treaty of Ft. Jackson entered into between the United States and the Creek Nation. This treaty had not been urged by the plaintiff as a basis of liability of the defendant and the contention of the intervenor based on said treaty is the principal new issue and new question raised by said intervention.

The determination of whether or not the Treaty of Ghent creates liability of the defendant as asserted by the intervenor depends upon the construction of Article IX of said treaty, and whether or not same is available to the plaintiff.

The defendant contends that the intervenor by raising the issue of liability of the defendant to the plaintiff under Article IX of the Treaty of Ghent has changed the issue in the case and is not entitled to do so under its Amended Motion of Intervention, Paragraph 13 of which reads as follows:

> "13. Applicants do not seek to alter or expand in any way in this proceeding the claim of the Creeks against the United States arising out of the Treaty of 1814, the merits of which are the principal issue in this proceeding. Moreover, understanding fully that a trial has already been held *upon the merits of the claim and upon the amount of damages, they do not seek to re-*

open the record for the taking of additional testimony or the presentation of any other additional evidence on these issues. Applicants desire to offer only whatever additional proof this Commission desires in order to establish: (a) that the injury was one to the Creek Nation as it existed prior to the migration, (b) that all descendants of members of such Creek Nation are entitled to recover therefor, and (c) that applicants are members of such class."

Intervenor contends that the paragraph quoted does not restrict its evidence under the order of the Commission permitting the intervention; that the ultimate issue is the liability of the defendant for the value of the land ceded by the Treaty of Ft. Jackson and that the assertion by it of liability by reason of Article IX of the Treaty of Ghent is merely urging an additional basis for liability—that the ultimate issue is not changed.

Even if the issue made by the intervenor is a new issue it would seem that it probably has the right to assert the same because it was filed on April 4, 1951, prior to the limitation date of the filing of claims. Another reason that this Commission thinks the intervenor has a right to urge said basis of liability, if it be one, is because of the liberal construction that should be given in these Indian cases to the assertion of rights on the part of the Indians and of pleadings on their part. Even though we be in error in granting the right to urge said treaty as a basis of liability, our holding with reference to same, as it will hereafter appear, makes said error (if any) of no effect.

In construing the Treaty of Ghent under Article IX thereof and the terms and intent of the parties thereto, it is conceded by both parties that recourse may be had to its history, including the negotiations therefor, the diplomatic correspondence of contracting parties, the official acts of the Government or its officials in interpreting the same, etc. (Int. Orig. Brf., p. 203; Def. Brf., p. 57).

Article IX of the Treaty of Ghent provides in part as follows:

> "The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratifications; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities: *Provided* always, That such tribes or nations shall agree to desist from all hostilities against the United States of America, their citizens and subjects, upon the ratification of the present treaty being notified to such tribes or nations, and shall so desist accordingly."

The Treaty of Ghent was concluded on December 24, 1814, and ratifications of same by the respective nations involved were exchanged on February 17, 1815, and it was proclaimed by the President on February 18, 1815. The treaty provides that it shall become effective and binding when these ratifications have been exchanged.

The so-called Treaty of Ft. Jackson was concluded on August 9, 1814, and was proclaimed on February 16, 1815.

The eighth Article of the Treaty of Ft. Jackson provides that peace shall ensue between the Creek Nation and the United States from its date.

The last expression of the American Commissioners to the British Commissioners with reference to the provisions of the Treaty of Ghent (later concluded) as to the provisions therein made with reference to Indians was contained in a letter dated October 13, 1814, which reads as follows:

> "The article proposed by the British Plenipotentiaries, in their last note, not including the Indian tribes as parties in the Peace, and leaving the United States free to effect its object in the mode consonant with the

relations which they have constantly maintained with those tribes, partaking also of the nature of an amnesty, and being at the same time reciprocal, is not liable to that objection; and accords with the views uniformly professed by the undersigned, of placing those tribes precisely, and in every respect, in the same situation as that in which they stood before the commencement of hostilities. This article, thus proposing only what the undersigned have so often assured the British Plenipotentiaries would necessarily follow, if, indeed, it has not already, as is highly probable, preceded, a peace between Great Britain and the United States, the undersigned agree to admit it in substance as a provisional article, subject in the manner originally proposed by the British Government, to the approbation or rejection of the Government of the United States, which having given no instructions to the undersigned on this point, cannot be bound by any article they may admit on the subject."

The receipt of this statement is acknowledged by the British Commissioners in letter lated October 21, 1814, such letter of acknowledgment using this language:

> "The undersigned have had the honor of receiving the note of the American Plenipotentiaries of the 13th instant, communicating their acceptance of the Article which the undersigned had proposed on the subjet of the pacification and rights of the Indian nations."

No further mention in said letter of said British Commissioners is made as to the article of the Treaty dealing with the Indians.

The negotiations preliminary to the execution of the Treaty of Ghent disclosed definitely that the British attempted to include the Indians as parties to said treaty as to which they did not succeed, and that it was agreed that under Article IX the United States was "free to effect its object in the mode consonant with the relations they

have constantly maintained with these tribes, partaking also of the nature of an amnesty, and being at the same time reciprocal" (Deft's Brf., p. 58); and the interpretation which the United States placed on said Article IX of the treaty is clearly revealed by what the Government did following treaty ratification. In the instructions given to Generals Harrison and McArthur, Mr. John Graham, the Secretary of War advised them:

> "When the treaty with Great Britain was ratified at Washington, the United States were at war with some of the Indian tribes, and at peace with others. By the ninth article of the treaty the parties reciprocally engaged to put an end to hostilities with all the tribes or nations with whom they were respectively at war; • • • But the United States were at that time in a state of peace and friendship with the tribes inhabiting the State of Ohio and the Territories of Michigan and Indiana; *and had, in particular, concluded a treaty at Greenville, on the 22d July, 1814, with the Wyandots, Delawares, Shawnees, Senecas, and Miamies.* • • •" (Emphasis supplied.) (Deft's Brf., p. 58.)

As a result of these instructions the United States negotiated and concluded twenty-one treaties of peace with the Indians of the Mississippi and the Northwest. (Intervenors have set these different treaties out at great length in their proposed findings and have summarized in their brief, pp. 209-213.)

No commissioners were appointed to treat with the Creeks and the reason is obvious; it was thought that the ninth article of the treaty did not apply to that tribe. (Secretary Dallas wrote this to Judge Harrison on June 9, 1815.)

That this conclusion is correct is substantiated by the contemporaneous statements of American Governmental officials. On July 10, 1815, Secretary of State, James Monroe, advised the British that the 9th Article had no bearing on the Creek Nation, and this position was reiterated by

statement of Secretary of War on October 3, 1817; by statement of John Q. Adams on November 28, 1818, and again by statement of Secretary Adams on November 30, 1818; and by Richard Rush, on behalf of the United States, on January 11, 1819. (Deft's. Brf., pp. 14, 15, 58, 59.)

Subsequent to the ratification of said treaty, and on May 8, 1815, Anthony St. John Baker, British charge de affaires in Washington, wrote Viscount Castlereagh of England that he had received from James Monroe, Secretary of State of the United States, a communication to the effect that the United States had taken measures looking to the pacification of the northern Indians but that the United States conceived that it had prior to the execution of the Treaty of Ghent already made peace with the Creeks by the Treaty of Ft. Jackson. That this was the view of the Secretary of State at the time is further confirmed by letter of July 10, 1815, of James Monroe to Anthony St. John Baker in which he stated among other things the following:

> "* * * that as the Treaty with the Creeks was concluded before the Treaty of Peace with Great Britain, the 9th article of that Treaty has no bearing with that nation * * *."

At no time has the Government of the United States conceded that Article IX of the Treaty required a return to the Creek Nation of the lands ceded by the Treaty of Ft. Jackson, but on the contrary has maintained the position that the Treaty of Ft. Jackson having been concluded prior to the conclusion of the Treaty of Ghent, was a conclusion of peace with the Creek Nation and a conclusion of the hostilities that had been engaged in between the Creeks and the United States prior to the execution of the Treaty of Ghent, and that the provisions of Article IX therefore had no application to the Creek Nation, or any part of it.

Although some efforts seem to have been made on the part of leaders of the so-called Hostile groups of the Creeks, who after the Treaty of Ft. Jackson went to Florida, then

Spanish Territory, to get Britain to invoke the provisions of Article IX in behalf of said Hostile group, it is significant that no effort was made by the British government in this respect—there being no evidence of Britain or any of its higher officials having called on the United States to deal with the Hostile group of Creeks or to protest or object to the construction given by the United States to said article as not having been intended to include the Creeks as its beneficiaries.

It is significant in connection with the claimed efforts on the part of the Hostile groups to benefit by Article IX of the Treaty of Ghent that the purported acceptance of the provisions of said Article by the Hostiles, which was signed by three Chiefs,—Hepoaeth Meico, Cappachimico, and Hopoy Meico—recited that the signers were "chiefs of the Muscogee nation, declared by His Britannic Majesty to be a free and independent people," and that they "in the name of said nation, agree to the ninth article of the treaty of peace." (See Int. Orig. Brf., p. 122.)

Attention is also called to communication of November 18, 1816, of Boleck (Chief of the Seminoles with whom the Hostile Creeks were associated), wherein refers to "our good father, King George." (id., p. 125.)

The efforts claimed by the Intervenor to have been made by Hostile Creeks as being entitled to benefits under Article IX were made while said Creeks were in Florida and were associated with the Seminoles at the time who were then directed by English officers and provided with arms and ammunition by the Spanish and English. (See Int. Req. Fdgs., pp. 125-154, inc.) They certainly were not any more of a separate organization capable of making a treaty than they were at the time of the execution of the Treaty of Ft. Jackson, at which time Intervenor asked a finding that they were not such an entity as was capable of making a treaty or authorized to cede land. (id., p. 194.)

Even if the Treaty of Ghent required a return to the Indians of the lands ceded by the Treaty of Ft. Jackson,

which we think it was not intended to do, we are of the opinion that such requirement is subject to abrogation by the United States without creating any legal liability. The Supreme Court has repeatedly held that Congress is authorized to modify provisions of previously executed treaties. The latest decision found dealing with this question is that of *Moser* v. *United States,* 341 U. S. 41. While it is held by this decision that the act of the Government complained of as not being in keeping with a treaty was not directly an issue—(the Court being of the opinion that the statute involved was not inconsistent with the treaty it was alleged to controvene)—the Court in discussing the question made this statement:

> "*Not doubting that a treaty may be modified by a subsequent act of Congress,* it is not necessary to invoke such authority here, for we find in this congressionally imposed limitation on citizenship nothing inconsistent with the purposes and subject matter of the treaty." (Emphasis supplied.)

The following cases are cited as authority for Congress to modify a previously executed treaty:

> Clark vs. Allen, 331 U. S. 503, 8, 9;
> Pigeon R. R. vs. Cox, 291 U. S. 138, 160;
> Head Money cases, 112 U. S. 580, 597-9;
> Cook vs. U. S., 288 U. S. 102, 120.

While no act of Congress has been cited which directly interprets or modifies the Ghent Treaty, the language of the Commissioners negotiating the Treaty, the refusal of the United States Government after execution to construe the same as including the Creeks, and the continued recognition by the United States of the ownership of the lands ceded by the Treaty of Ft. Jackson, and the disposition of said lands under act of Congress as public lands (Act of Congress of March 3, 1815, (3 Stat. 228) provides for survey and disposition as public lands of the lands ceded by the Ft. Jackson Treaty) and the issuance of patents to in-

dividual purchasers thereof, would seem to be as effective as would an affirmative congressional act denying the application of Article IX of the Treaty of Ghent to the Creek Nation, or any portion thereof.

The defendant submits as its Finding No. 14 a statement that "The United States consistently took the position that since the Treaty of Peace with the Creeks was entered into before the Treaty of Ghent, the 9th Article of that treaty had no bearing on the relations with that Nation." The intervenor makes no objection to this finding "if it relates only to the Creek Nation as it existed on August 8, 1814."

It is undisputed that the Creek Nation was the same at the time of the execution of the Treaty of Ghent as it was at the time of the execution of the Treaty of Jackson. What the intervenors are actually claiming is that although the Creek Nation was not at war with the United States on February 17, 1815 (at the time of the execution of the Treaty of Ghent), and although the Creek Nation was the owner of the land ceded by the Treaty of Jackson, nevertheless the United States is obligated to restore the land to the Creek Nation because some of the constituent groups or bands of said Nation continued hostile and were, in the viewpoint of the intervenor, "at war" with the United States on the date of the Treaty of Ghent.

Even if such groups or bands were at war (however, the hostilities in evidence between such bands and groups and the United States which continued after the Treaty of Ghent were more in the nature of sporadic depredations and skirmishes as might be engaged in by guerrillas and not under the usual definition of a "war"), *there certainly was no continuation of the hostilities that the Treaty of Jackson terminated.* More detailed discussion of the hostilities subsequent to the Treaty of Ghent is found in a later section hereof.

From the statements made by the American Secretaries of State in regard to the application of Article IX of the

Treaty of Ghent, and other contemporaneous expressions and actions of our Government in making treaties of peace with tribes whom they considered covered by Article IX, it cannot be doubted that the executive interpretations of the Treaty of Ghent were that Article IX was considered inapplicable to the Creeks. The construction given by the Executive Department of the Government as to the meaning of treaties is generally recognized as determinative of their meaning as far as municipal law and the Courts are concerned is unquestioned. (63 C. J. Sec. 20; U. S. vs. Payne, 8 Fed. 883, 892; San Lorenzo, etc., vs. Caples, 48 S. W. 2d 329 (Texas); Sullivan v. Kidd, 254 U. S. 433; 124 U. S. 253.)

Without doubt the said Article IX of the Treaty of Ghent was inserted therein by the British in order to protect Indians, who had been allies of the British in the War of 1812 against the United States, from being punished or made to suffer loss by the United States for being allies of the British. In the negotiations which resulted in the execution of the Treaty of Ghent, and in a communication of July 28, 1814, Lord Castlereagh wrote to the British Commissioners that in their approaching discussions they should see to "the protection which the Indians, as allies, are entitled to claim at our hands." (Def. Ex. 68, p. 68.) A protocal of conference between British and American Commissioners of August 8, 1814, showed as a subject of discussion "that the peace be extended to the Indian allies of Great Britain." (Int. Ex. 56, p. 1585.) Other references in said discussions referred to the intention of the British Government in said peace to take care of the Indians "who have acted with them as allies during the war." (Int. Ex. 58, p. 87; Def. Ex. 67, p. 194.) In letter of Henry Golbourn, one of the British Commissioners at Ghent, dated August 21, 1814, to Lord Bathurst, with reference to the provisions of the treaty being negotiated and as to the provisions with reference to the Indian allies of the British, he stated that it was of "very great importance" that he acquaint the

American Commissioners "that Great Britain does not prohibit their acquisition of territory by conquest." (Def. Ex. 67, pp. 188, 189.)

That the United States recognized that Article IX of the treaty applied only to Indians who were allies of the British in the War of 1812, and that as to these Indians it desired to comply with the provisions of said Article, is evidenced by the language used in treaties executed between it and the Indian allies of the British in said war. For instance, the treaty with the Teton of July 19, 1815, in its preamble says:

> "The parties being desirous of re-establishing peace and friendship between the United States and the said tribe, and of being placed in all things, and in every respect, on the same footing upon which they stood before the late war between the United States and Great Britain, have agreed * * *." (II Kapp. 112.)

The same language appears in the preamble to the treaty with the Sioux of July 19, 1815 (II Kapp. 113); and the same language in the treaty with the Sioux of St. Peter's River of the same date (II Kapp. 114); and the same language in the preamble of the treaty with the Yankton Sioux (II Kapp. 115); and the same language in the treaty with the Makah (II Kapp. 115); and the treaties with the Piankasaw (II Kapp. 111), and with the Kickapoo (11 Kapp. 116), and with the Wyandot, et al., (II Kapp. 117), and with the Osage (II Kapp 119), and with the Sauk(II Kapp. 120), and with the Foxes (II Kapp. 121), and with the Iowa (II Kapp. 122), and with the Kanzas (II Kapp. 123), and with the Sauk (II Kapp. 126), and with the Sioux of the Leaf, et al., (II Kapp. 128), and with the Winnebagos (II Kapp. 130)—and others, contain similar language indicating that same were based on the fact of the Indians having been allies of Great Britain in the War of 1812 and by reason of the ending of that war.

The facts as set out in our decision of April 22, 1952, and the findings of fact upon which said decision was based, all of which are reaffirmed by this decision, except as modified, show that the hostilities resulting in the treaty of Ft. Jackson were not a part of the War of 1812 with Great Britain but were activities of hostiles engaged in a civil war between different factions of the Creek Nation against each other; in which war the United States came to the aid of the faction engaged in said internecine warfare that was friendly to it, and which faction would have been overcome by the so-called hostiles among the Creeks who were fighting their brothers and the whites; that said hostiles were not fighting in said so-called Creek War as allies of the British but solely against their tribal brothers who were friendly to the United States. Such association as occurred during said Creek War between said Creek hostiles and the British was that of assistance of the British (with Spanish help) to the said Hostiles in their warfare against their Creek brothers. It was only after the ending of this so-called Creek War that these Hostile Creeks moved into Spanish and English territory and became more or less allied with the Bristish in joint hostilities across the border, which continued not only before the Treaty of Ghent was signed, but thereafter.

Whatever damage or injury that might be claimed as having been suffered by the Hostile Creeks by the cession of land made by the Treaty of Ft. Jackson was sustained by them, not because they were allies of the British in the War of 1812, but solely because of their war against their own brothers and Americans in the so-called Creek War. Regardless of the correctness of the views herein previously expressed with reference to Article IX and its availability to the Creek Indians—in no event could said Article be of benefit to any Indian tribe or portion of said tribe unless those claiming the benefit thereof ceased all hostilities against the United States after the ratification of said treaty by the parties thereto. It is submitted that the great weight of the evidence as to the acivities of the Hos-

tile Creeks as found by the findings of fact which constitute a part hereof subsequent to the execution of the Treaty of Ghent show that said Hostile Creeks failed to comply with the provisions of said article as to ceasing hostilities against the United States, and continued said hostilities long after the effective date of said treaty of Ghent.

Without restating the record of the activities of said Hostile Creeks as appearing in said findings of fact, it would seem sufficient merely to refer to same and to say that in our opinion said activties do not seem to have been for the purpose of securing the return of what said Creeks considered their lands by keeping the peace, if the return of their lands was their objective, but were seeking the return of same by making war. It is our opinion that the motives of these Hostile Creeks were more likely to be to serve British interests for the Compensation they probably were receiving in money as well as positions of prominence from the British.

For the reasons hereinabove set out, we affirm the opinion rendered by this Commission on April 22, 1952, and the award therein made to the Creek Nation in the sum of $1,769,940, less such offsets, if any, as may hereafter be allowed in accordance with Sec. 12 of the General Rules of Procedure of this Commission.

We further hold as directed by the Court of Claims in C. W. McGhee, Appellants, vs. Creek Nation and the United States, Appellees (122 Ct. Cls., p. 380), that such award shall be for the benefit of all descendants of the Creek Nation as it was constituted in 1814, and recognized by the United States in the treaty of cession of that year, the method of determining the identity of such descendants to be provided by Congress in making an appropriation to pay this award.

Edgar E. Witt, Chief Commissioner.

Concurring: Louis J. O'Marr, Associate Commissioner; Wm. M. Holt, Associate Commissioner.

Appendix N.

BEFORE THE INDIAN CLAIMS COMMISSION.

The Yuchi (Euchee) Tribe of Indians, and S. W. Brown, Legus Brown, Jacob Rolland, Willie Tiger, Fred Skeeter, John James and Jesse James, all members of said Tribe, band or group of Indians, for themselves and for the use and benefit of all other members of said Yuchi (Euchee) Tribe, band or group of Indians, Claimants, v. The United States of America, Defendant.—Docket No. 172.

Decided: May 16, 1955.

Appearances: Herbert S. French, with whom were Lewis M. Dabney, Jr., and J. T. Smith, Attorneys for Claimants; Ralph A. Barney, with whom was Mr. Assistant Attorney General, Perry W. Morton, Attorneys for Defendant.

OPINION OF THE COMMISSION.

Witt, Chief Commissioner, delivered the opinion of the Commission.

This claim is asserted by the Yuchi (Euchee) Tribe of Indians, by its officials; and by the said officials as members of said tribe, band or group, for themselves and all other members of said tribe, band or group.

Said claimants assert that their predecessors in interest were the owners of more than 11,200,000 acres of land which were ceded to the United States by the Treaty of August 9, 1814 (usually referred to as the Treaty of Fort Jackson); that said cession was without their voluntary consent, and that said tribe received no consideration then or afterwards for said lands. Claimants pray for judgment against the defendant for the sum of $22,400,000 as the value of said 11,200,000 acres, with interest, from August 9, 1814.

Among other defenses urged by defendant are (1) that

the claimant tribe was at all times referred to in the petition, a part of what was known as the Creek Confederacy —that is, the Creek Nation; (2) that the lands for which compensation is sought are a part of and are included in the claim of the Creek Nation, Docket No. 21, now pending before this Commission.

It is unnecessary to state or discuss other defenses by reason of our decision as herein made as to the defenses stated.

The Findings of Fact upon which this decision is based clearly show that the Yuchi Tribe was incorporated and became a part of the Creek Nation at an early historic period (between 1733 and 1751); that after its incorporation into the Creek Nation, the said tribe became subject to the authority of said Nation and was bound by its laws; that the tribe lost whatever status it ever had as an independent tribe, and never regained it; that the Yuchi Indians are now a constituent part of the Creek Nation, are enrolled on official Creek rolls as Creek Indians; that they received allotments of Creek lands as Creek Indians, and are represented in the Creek Tribal Council and are under the authority of the principal chief of the Creek Nation.

While the record shows that the Creek Confederacy or Nation was composed of Creek towns, each of which had control of purely local matters—the paramount governmental authority of the Creek Nation was the National Council which alone had authority as to national affairs. The National Council of the Creek Nation was composed of the head men of the several tribal towns which constituted the Creek Nation. These Councils met when occasion demanded, and at least once a year, wherein all matters were deliberated with freedom and when decisions were made, they were promulgated as the will of the Nation. The Creek National Council had exclusive control over all the lands of the Creek Nation, and alone had the power of the disposition of them.

The Yuchi admit that they were incorporated into the Creek Confederacy but contend that they were thereafter an entirely separate and distinct tribe not subject to the Creek government and laws. The record does not support this contention; same shows that from the time of their incorporation in the Creek Nation, the Yuchi were subject to the Creek government and its laws.

The Treaty of June 29, 1796 (7 Stat. 56) was a treaty executed by the United States with the Creek Nation. It was executed on behalf of the Creek Nation by its "Kings, chiefs, and warriors." Yuchi town Chiefs signed this treaty as a constituent part of the Creek Nation as a whole, along with the other chiefs of the Creek Nation. The treaty was signed at the meeting of the National Council of the Creek Nation, and Yuchi town chiefs must have attended said treaty council for their names appear on the treaty.

The Treaty of June 16, 1802 (7 Stat. 68) was a treaty between the Creek Nation and the United States. Timothy Barnard, who was closely connected with the Yuchi, signed this treaty as one of the interpreters.

The Treaty of August 9, 1814, the Fort Jackson Treaty, which ceded part of the lands involved herein, was signed by Yuchi chiefs, as members of the National Council of the Creek Nation; said Yuchi chiefs signed the protest as to said treaty which was made by Creek officials to accompany the same.

From the above matters of record and others, the Commission is of the opinion that the Yuchi are not an independent Indian Tribe, band or other identifiable group within the meaning of the Indian Claims Commission Act, entitled to prosecute a claim independent of the Creek Nation, for lands ceded the United States under the Fort Jackson treaty of August 9, 1814.

Regardless of the correctness of the conclusion we have reached as to the aforesaid issue, we think that the evidence fails to show that the Yuchi, if they were a tribe,

band or other identifiable group entitled to prosecute a claim before the Indian Claims Commission, had as a tribal entity Indian title to any lands of which they were deprived by the treaty of Fort Jackson, or Indian title to any lands whatsoever.

The treaties to which we have already referred, which were joined in by so-called Yuchi chiefs, evidenced a recognition by said Yuchi that the land involved belonged to the Creek Nation as a Nation and that it was controlled by the Council of said Nation and could only be ceded by said National Council. We will refer to one other treaty, to-wit: the treaty of Indian Springs, dated February 12, 1825 (7 Stat. 237) which was executed between the United States and only a few of the Creek towns purporting to represent the Creek Nation. This treaty was executed after the National Council of the Creek Nation in 1824 had declared that "on no account whatever will we consent to sell one foot of our land, neither by exchange or otherwise. * * * that the land is to remain as it is, in common, and as it always has been." Because the Treaty of 1825 had been executed without the approval of the Creek National Council, Chief McIntosh, who had joined in the execution, was put to death and by treaty dated January 24, 1826 (7 Stat. 286) by the Creek National Council, the previous treaty of 1825 was declared null and void. It is significant that one of the Creek chiefs who signed this treaty of 1826 was Timpoochy Barnard, Chief of Yuchi town of the Creek Nation.

Therefore, it is clearly demonstrated that the title to all Creek lands was in the Creek Nation as a whole, and not in any individual Creek town or specific group which was a part of the Creek Nation.

By the Treaty of August 7, 1790 (7 Stat. 35) the Creek Nation as an entity relinquished land and agreed to come under the protection of the United States and the United States solemnly guaranteed to it as an entity certain lands. Thereafter the Treaty of June 29, 1796 (7 Stat. 56) called

the Colerain Treaty was executed by the United States and the Creek Nation, under the terms of which provisions of the Treaty of August 7, 1790 were confirmed. Nothing in this 1796 treaty, in the opinion of the writer, can be construed as confirming lands in any entity except to the Creek Nation as a whole.

The ownership by claimants of land in their tribe, separate and apart from any common ownership that they might have as a part of the Creek Nation, is based on their contention that such ownership was guaranteed to them by the so-called Treaty of Colerain of June 29, 1796 (7 Stat. 56). This treaty was made with the Creek Nation, represented by the "Kings, Chiefs and Warriors of the Creek Nation of Indians." In their brief at page 29, claimants say that this treaty was signed by representatives of 35 tribes "including the Yuchi" and that by said treaty the United States "solemnly guarantee to the Creek Nation all the lands within the limits of the United States," as described in said treaty. The Yuchi contend that although the grant in said treaty was to the Creek "Nation" that because the Nation was a Confederacy that such grant was "to the particular tribe in that Nation or Confederacy, to-wit, the Yuchi, which, at the time of the Treaty of Colerain, occupied the lands for which the Yuchi now claim compensation." This Commission cannot agree with said construction of said treaty.

It is contended by the Yuchi that the holding of this Commission in the Ottawa cases (Dkts. 40-B to 40-F, inclusive, and Dkt. 133) wherein we say that "there was no recognized single entity as the Ottawa Nation, but that the so-called Nation consisted of separate entities in the nature of bands or groups of Ottawas" justifies a similar conclusion as to the Creek Nation. It is our opinion that the situation of the Ottawas is not analogous to that of the Creek Nation. Our holding as to the Ottawas was based on the conduct of the parties to the various treaties involved before and after their execution; likewise in the instant case,

our holding that the ownership of the lands involved was in the Creek Nation and not in any separate entity in the nature of a band or group of Creeks, is based on the conduct of the parties before and after the execution of the treaties, as well as the language of the treaties.

Moreover, the Yuchi have not established exclusive use or occupation of any described tract or tracts of land. As a matter of fact, they do not describe any such exclusively owned and occupied tract or tracts in their petition nor have they asked for any findings of fact describing definitely lands as being exclusively occupied and owned by them.

The requested findings Nos. 6 and 7 as to their lands read as follows:

6. From about 1750 up to and including the Creek War (1813-14) the Yuchi were settled in Southeastern Alabama (where their principal town was located) and throughout South and East Georgia. Specific places of residence were as follows:

(a) The principal town lay on the west bank of the Chattachoochee at the junction of Yuchi Creek in what is now Russell County, Alabama.

(b) The following subsidiary towns or villages were situated upon the Flint River and its tributaries, east of and within 30 to 50 miles of the principal town: In-tuch-cul-gau; Pad-gee-li-gau; Toc-co-gul-egau; and the settlement of Timothy Barnard, his Yuchi wife and children, lying on the right bank of the Flint River, to gether with the nearby farm settlements of some of his children.

(c) The following settlements upon the following rivers in Georgia flowing into the Atlantic; The head of Cannouchee, the head of the Satilla, the fork of the St. Mary's and the head of the St. John's.

7. The Uichi hunting grounds lay south of the Altamaha River, and centered around the Okefinokee

Swamp. They guarded their hunting grounds with four permanent outpost settlements, or guard villages, which were connected with the four Yuchi tribal towns. They excluded other Indians.

Their requested Finding No. 16 is as follows:

16. The Yuchi did not claim or occupy any of the Oconee lands surrendered to the United States by the treaty of New York, which surrender was ratified by the treaty of Colerain. They did claim, and exclusively occupied, Royce 44 and that portion of Royce 75 which is East of the Fint River, which was granted to "the Creek Nation" by the treaty of Colerain.

Attention is called to the fact that no part of the territory in (a) or (b), (Req. Fdg. 6) was included in the cession made by the Jackson Treaty; and that in (c) only the portion of the territory described as the head of the "Satilla" (which is not defined) was included in the territory ceded by the Jackson Treaty.

Requested Finding 7 does not define the grounds mentioned.

Requested Finding 16 describes the lands claimed as Royce 44 (which land was not included in the Jackson Treaty) and "that portion of Royce 75 which is East of the Flint River."

No finding is requested giving the boundaries of lands alleged to belong to the Yuchi unless it be the description requested by Finding 16 of "that portion of Royce 75 which is East of the Flint River."

Elsewhere in the requested findings and in the brief the portion of Area 75 which is claimed as "hunting grounds" are described as being "centered around the Okefinokee Swamp."

Claimants later state the basis upon which they are entitled to an award in Requested Findings 32 and 33, which read as follows:

32. The Yuchi tribe is entitled to an award, based on their separate and exclusive possession and ownership, of that portion of Royce 75 which lies east of the Flint River and that portion of Royce 44 which adjoins it on the east.

33. The Yuchi tribe is entitled to an additional award based on their occupancy of a part of that portion of Royce 75 which lies in Georgia and Southeastern Alabama, between the Flint River and the division line between the Upper and the Lower Creeks as recognized by Commissioner Luke Lea in 1854. The evidence indicates that at the time of the Treaty of Fort Jackson the Yuchi constituted about 25% of the Lower Creeks.

The nearest to any definite description of lands which they claim they owned as a separate tribe is "that portion of Royce 75 which is East of the Flint River" by Requested Finding No. 16; however, no evidence is cited to support said finding of occupancy of the land described in Requested Finding No. 16, nor is any evidence cited to support any of the findings with reference to the lands claimed.

There is no proof of continued occupancy of any defined territory. Proof shows that the Yuchi wandered in small groups all over the southeastern area. They seem to have moved down into Georgia, Florida and Alabama in successive waves of migration from 1600 to 1750. They say that between 1733 and 1751 they abandoned their lands on the Savannah and Ogeechee and part of the Yuchi moved southwest to the Chattachoochee and established what later became the principal Yuchi town and a part of them moved more directly south, parallel with the Atantic Coast, and established settlements on the various rivers flowing into the Atlantic, and around the Okefinokee Swamp. About that time (1733-1751) they voluntarily affiliated themselves with the Creek Confederacy.

Claimants say that from about 1750 up to and includ-

ing the Creek War they were settled in southeastern Alabama (where their principal town was located) and throughout south and east Georgia and northern Florida.

They say in their brief (p. 27) as follows:

> The Yuchi had exclusive possession of, and Indian title to, their hunting grounds which centered around the Okefinokee Swamp and lay south of the Fort Jackson Treaty line, east of the Flint River, and west of the line established by the treaty of New York and ratified by the Treaty of Colerain. They had exclusive possession of, and Indian title to, about one quarter of the land lying south of the Fort Jackson Treaty line, west of the Flint River and east of the division line between the upper and lower Creeks. Such Indian title was recognized and ratified by the Treaty of Colerain.

No definite description is given—the description given could not enable a surveyor to locate the land intended to be included—and that outside the Jackson Treaty in no event could be the basis of a recovery. The claimants sue only for lands embraced in the cession made by the Fort Jackson Treaty of August 9, 1814, and even if proof of Indian title to lands which are outside said cession is made (which, however, this Commission does not think has been done), claimants would not be entitled to compensation therefor.

Nowhere in the record is there evidence of exclusive occupany by the Yuchi of any definite territory.

Assuming that they are an identifiable group, entitled to prosecute a separate claim, failure to establish exclusive occupancy of definable land within the cession of the Fort Jackson Treaty precludes a recovery.

It is undisputed that the Yuchi Indians are a part of the Creek Nation and that any award made to the claimants in Dkt. 21 will inure to the benefit of all descendants of the Creek Nation of 1814; and therefore the Yuchi Indians, who are descendants of ancestors who were members

of the Creek Nation of 1814, will be protected by and be beneficiaries of the litigation being prosecuted by the claimants in Dkt. 21.

For the reasons herein given, Dkt. 172 must be dismissed.

Edgar E. Witt, Chief Commissioner.

Concurring: Louis J. O'Marr, Associate Commissioner; Wm. M. Holt, Associate Commissioner.

Appendix O.

IN THE UNITED STATES COURT OF CLAIMS.

Appeals Docket No. 14.

(Decided May 6, 1952.) [122 U. S. Ct. Cls. 380.]

C. W. McGhee, Ruby Z. Weatherford, John V. Phillips and John Williams, as members of and on the relation of the Creek Nation East of the Mississippi, Appellants, v. The Creek Nation and the United States, Appellees.

Messrs. C. LeNoir Thompson, Thomas V. Lefevre and Claude Pepper for the appellants. Messrs. Frank G. Hume and Hugh Rozelle were on the brief. Mr. Paul M. Niebell for the appellee, The Creek Nation. Mr. Ralph A. Barney, with whom was Mr. Assistant Attorney General Wm. Amory Underhill, for the appellee, The United States.

On Appeal From the Indian Claims Commission.

Littleton, Judge, delivered the opinion of the court:

This is an appeal by C. W. McGhee, et al., as members of and on the relation of The Creek Nation East of the Mississippi, hereinafter sometimes referred to as the Creek Nation East, from an order of the Indian Claims Commission denying appellants' amended motion for leave to intervene as parties plaintiff in a suit now pending before the Commission and entitled The Creek Nation v. The United States (Indian Claims Commission Docket No. 21).

The proceeding in which appellants seek to intervene, was initiated on January 29, 1948, by The Creek Nation, a political body of Creek Indians inhabiting the Creek reservation in Oklahoma, to recover damages for the acquisition by the United States of 23,267,600 acres of Creek lands in Alabama and Georgia, under the Treaty of August 9, 1914,[1] such acquisition alleged to have been without compensation and contrary to the Government's obligation under the Indian Claims Commission Act[2] to deal fairly and honorably with the Indians. A trial of the issues on the merits of that claim by The Creek Nation was held, arguments heard, and the issues are now awaiting decision by the Commission. On January 5, 1951, The Creek Nation East[3] moved for leave to intervene. The motion, as later amended, was denied by the Commission.

Appellant sought intervention on the ground that the injury which was the basis of the claims asserted by The Creek Nation in Indian Claims Commission Docket No. 21, was in fact an injury to the entire Creek Nation as it was constituted in 1814, and that the unorganized descendants of members of such nation who remained east of the Mississippi River are as much interested in the subject matter and out-come of the litigation as are the organized descendants of that nation living in Oklahoma; that the petitioner-appellee, The Creek Nation of Oklahoma, whose membership is restricted to Creeks (and their descendants) who were living in Oklahoma and whose names were placed on the Creek rolls in 1907, is neither identical with nor the full successor to The Creek Nation as it existed in 1814, and

1. 7 Stat. 120.

2. Act of August 13, 1946, 60 Stat. 1049, 25 U. S. C. 70.

3. The original motion to intervene was made on behalf of The Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians. On August 31, 1951, the Indian Claims Commission issued an order allowing the motion of C. W. McGhee, Ruby Z. Weatherford, John V. Phillips and John Williams, as members of and on the relation of The Perdido Friendly Creek Indian Band of Alabama and North West Florida Indians to change the name of that Band to The Creek Nation East of the Mississippi.

that because appellees improperly claims to be such full successor and the exclusive owner of the claim in question; it thus denies rather than represents the rights of appellants.

The petitioner-appellee and the United States both opposed the intervention before the Commission. In denying the motion to intervene, the Commission held: (1) that appellants are not members of a "tribe, band or other identifiable group" within the meaning of the Indian Claims Commission Act and they do not have a common claim, but rather have a common suit for individual claims; (2) that petitioner-appellee has the exclusive right to prosecute the claim for the 1814 injury to The Creek Nation because of various acts of recognition of that tribe by the United States, notably by the Act of April 26, 1906, 34 Stat. 137; and (3) that the jurisdiction of the Commission does not extend to defining the identity of the individuals or members of the groups who may be entitled to recover on any claim placed before it, and that allowing the motion to intervene would require the Commission to do just that.

The facts which were before the Commission for the purpose of passing upon intervenor's' motion show that the members of the original Creek Nation of Indians were the aboriginal inhabitants of a large area which included nearly all of Alabama and Georgia, and parts of Florida and Mississippi. On August 7, 1790, The Creek Nation entered into a treaty[4] of friendship with the United States whereunder it placed itself under the protection of the United States and ceded certain lands. The United States, in turn, guaranteed to The Creek Nation all of its remaining lands within certain boundaries defined in that treaty. During the War of 1812, some of the members of The Creek Nation joined the British, while the others remained loyal to the United States and fought against the rebellious Creeks. With the help of the United States, the uprising was put

4. 7 Stat. 35.

down. On August 9, 1814, a treaty[5] was entered into between the United States and representatives of the "chiefs, deputies and warriors of The Creek Nation," including both the loyal and rebellious groups, whereby the Creeks ceded to the United States, without compensation, some 23,000,000 acres of their national domain.[6]

On January 24, 1826, the same Creek Nation concluded another treaty[7] with the United States under which it ceded for a named consideration a portion of its lands located in Georgia east of the Chattahoochee River. This treaty also provided that a portion of the Nation who had indicated a desire to move to land west of the Mississippi River, should send, at the expense of the United States, a deputation of five persons to select a country in that area as a home for those Creeks wishing to move. Subsequently, an area of land was selected in what later became the State of Oklahoma, and a small number of Creeks migrated west. As a result of further negotiations looking toward the removal of more Creeks to the Indian Territory west of the Mississippi, the Government and the Creek Nation entered into the Treaty of March 24, 1832[8] whereby all of the remaining Creek land lying east of the Mississippi River was ceded to the United States. This treaty provided for the patenting of land east of the Mississippi in fee simple to those Creeks wishing to remain there, and covenanted that the treaty should not be construed so as to compel any Creek Indian to emigrate—"but they shall be free to go or stay, as they please."[9]

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5. 7 Stat. 120.

6. It is the contention of the petitioner-appellee in its claim pending before the Commission, that the treaty of 1814 was entered into by the Creeks under duress, and that the actions of the United States in so procuring the cession of tribal lands without compensation violated all standards of fair and honorable dealings within the meaning of the Indian Claims Commission Act.

7. 7 Stat. 286.

8. 7 Stat. 366.

9. Article XII.

Boundary disputes arose between the Creeks who settled west of the Mississippi and that portion of the Cherokee Nation who had also emigrated to that country. On February 14, 1833, the United States entered into treaties with the Cherokees[10] and with the Creeks[11] settling the boundaries of their western lands. The treaty party for the Creeks were the "chiefs and headmen of the said Muskogee[12] or Creek Indians, having full power and authority to act for their people west of the Mississippi." The treaty provided that the land described would be patented in fee simple to the Creek Nation to be their property as long as they existed as a nation and continued to occupy the country assigned to them. Article IV provided that these lands should "be taken and considered the property of the whole Muskogee or Creek nation, as well as of those now residing upon the land, as the great body of said nation who still remain on the east side of the Mississippi." Article 5 [sic] provided for certain grants of money, for the furnishing of a blacksmith, and other benefits—"It being distinctly understood, however, that the grants thus made to the Creek Indians, by this article, are intended solely for the use and benefit of that portion of the Creek Nation who are now settled west of the Mississippi."

Following the treaty of March 24, 1832, wherein the Creek Nation ceded all its remaining land in the east to the United States, that portion of the Creek Nation which remained east of the Mississippi became United States citizens and maintained no tribal organization for the holding of property. The Creeks who settled west of the Mississippi formed a new tribal organization for the holding of property and management of tribal affairs in the Indian Territory, and were variously referred to as the "Creek Tribe of Indians West of the Mississippi," the "Creek Nation," and "The Creek Nation in the Indian Territory." Subse-

10. 7 Stat. 414.

11. 7 Stat. 417.

12. The Creek Nation of Indians were sometimes known and referred to as the Muskogee Confederation.

quent to 1833, treaties involving Creek Indians were between the United States and the new tribal organization of Western Creeks and related to property and affairs of those Creeks in Oklahoma.

Toward the latter part of the Nineteenth Century, the United States embarked upon a program to abolish communal ownership of land in the Indian Territory, by dissolving the tribal form of government and by allotting tribal lands to the individual members of the tribes to the extent necessary and disposing of the remainder to settlers. Individual members of the tribes were eventually to become citizens of the United States. The Act of February 8, 1887[13], provided, among other things, for the granting of United States citizenship to Indians who left their tribes, but it guaranteed the existing rights to tribal or other property of all Indians including those who had theretofore left their tribes. Pursuant to the Act of March 3, 1893,[14] a Commission was created, and later was empowered[15] and directed to make rolls of the citizens of the tribes in the Indian Territory as a basis for the later individual allotment of tribal lands in that territory and the distribution of tribal funds. The Act of June 28, 1898,[16] provided that for the purpose of allotment of lands in the Indian Territory and the distribution of tribal funds, "No person shall be enrolled who has not heretofore moved to and in good faith settled in the nation in which he claims citizenship." The Treaty of March 8, 1900, between the United States and the "Muskogee or Creek tribe of Indians," confirmed by the Act of March 1, 1901,[17] specifically restricted Creek enrollment for allotment and distribution purposes to those Creeks living in the Indian Territory. In paragraph 1 of the Act, "Definitions," it was provided:

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13. 24 Stat. 388.
14. 27 Stat. 612, 645.
15. Act of June 10, 1896, 29 Stat. 321, 339.
16. 30 Stat. 495, 503.
17. 31 Stat. 861.

> The words "Creek" and "Muskogee," as used in this agreement, shall be deemed synonymous, and the words "Creek Nation" and "tribe" shall be deemed to refer to the Muskogee Nation or Muskogee tribe of Indians in Indian Territory. * * *

The Act of May 8, 1906,[18] reaffirmed the prior guarantee to those Indians who had left their tribes and become United States citizens, as to any rights they might have to tribal or other property. Pursuant to the Act of April 26, 1906,[19] the rolls of the Creek Nation for allotment and distribution purposes were closed on March 4, 1907, and tribal ownership of land in the Indian Territory west of the Mississippi was abolished. For certain limited purposes, the Creek Nation west of the Mississippi retained and still maintains a tribal organization.

In the basis of the above facts the Indian Claims Commission has determined that appellee has the exclusive right to prosecute the claim for the 1814 injury to the Creek Nation; primarily, because subsequent to 1832, when all territory of the Creeks east of the Mississippi was ceded to the United States, all dealings of the Federal Government were had with the Creeks in Oklahoma and at no time after that date did defendant ever recognize by treaty or otherwise, those Creeks remaining east as the Creek Nation. We are unable to agree with this holding. The land which is the subject matter of this suit was not land in Oklahoma, nor was it land concerning which the United States dealt exclusively with the Oklahoma Creeks. It was land located east of the Mississippi which was obtained by the United States in 1814 under a treaty with the Creek Nation, all of whose members then lived east of the Mississippi, and whose identity as a tribe and whose ownership of the land ceded had been specifically recognized by the Treaty of August 7, 1890 [1790]. If an injury was inflicted by the Unit-

18. 34 Stat. 182.
19. 34 Stat. 137.

ed States in procuring and enforcing the Treaty of August 9, 1814, it was an injury to the members of the Creek Nation with whom the treaty was negotiated and who owned the land in question, and not merely an injury to the Creek Indians who (or whose heirs) later emigrated to the Indian Territory west of the Mississippi and formed a new and separate tribal organization for the purpose of holding and managing property awarded to them in the west. It is true that the Creek Nation west of the Mississippi has been recognized by the United States as a political organization for the purpose of dealing with their land and affairs in the Indian Territory. If such Western Creeks have a right to make a claim for the injury to the eastern land in 1814, it is not, we think, by virtue of such later recognition nor because their names or the names of their ancestors appear on the roll completed on March 4, 1907 That Creek roll was made up for the specific purpose of allotting in severalty to Oklahoma Creeks the land owned by the tribe in Oklahoma. We believe that the rights of the Western Creeks to sue for the injury arising out of the cession of the eastern land in 1814, arise rather by virtue of the membership of their ancestors in the tribe recognized by the United States in 1814 as the owner of that land, and that those rights are in no way superior to nor different from the rights of the descendants of all members of the Creek Nation as it was constituted at the time the 1814 treaty was executed. The maintenance or lack of maintenance of tribal relations and the occurrence or non-occurrence of acts of recognition of a tribal organization of the Creek Indians in Oklahoma or east of the Mississippi, subsequent to 1814, would not affect or change what was done to the Creek Nation of 1814. Any claim for an injury to the Creek Nation of 1814, is a claim belonging, if at all, to the descendants of all the members of that Nation whether they live east or west of the Mississippi, and whether organized or not, recognized or not, subsequent to that date.

We can conceive of no valid reason for holding that the claim for the wrong to the Creek Nation in 1814 de-

scended only to those descendants who emigrated thereafter to Oklahoma and set up a new tribal organization. Nor can we see how the failure of the Creeks remaining east to maintain a tribal organization, cures the injury done to them as members of the Creek Nation of 1814. As this court said of the Cherokee lands east of the Mississippi in the case of The Cherokee Nation v. The United States, 40 C. Cls. 252, 325; affirmed 202 U. S. 101:

> The contracting party here, being also the party who made the conveyance of the Cherokee Outlet, was the Cherokee Nation; and if the lands of the Cherokees were, like the lands of the United States, Government lands, or public lands in which the Government has the sole proprietary interest, and in which no individual has any personal interest whatever, there could not be a doubt of the exclusive right of the Cherokee Nation to have a judgment awarded in its name. But in 1835 the lands of the Cherokees east of the Mississippi, and in 1846 the lands of the Cherokees in the Indian Territory, were neither public nor private lands in the ordinary sense of those terms. The term "communal," it is believed, is not to be found in treaties or statutes or public documents relating to the Indians prior to the date of the case of the Western Cherokees (27 C. Cls. R. 1). But the officers of the Government, under stress of circumstances—that is to say, the expectations of the Indians—have always treated Indian lands as communal, though they did not use the term and had very dim perceptions as to the nature of the estate. * * *
>
> * * * * * * * *
>
> While the United States have always, or nearly always treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case the negotiations have been with representatives of the owners. The chiefs and headmen have ordinarily been the

persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate, and they have not assumed to hold the title or be entitled to the purchase money. They have simply acted as representatives of the owners, making the cession on their behalf, but allowing them to receive the consideration *per capita*. In the present case the Cherokee Nation takes the place, so far as communal ownership is involved, of the chiefs and headmen of the uncivilized tribes. This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their Government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it.

As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation, and the nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the treaty of 1835, were equally interested with the communal owners who were carried to the West, in the $5,000,000 fund which was the consideration of the cession, so far as it was to be distributed *per capita* * * *.

* * * * * * * *

The persons to whom distribution of this fund of $1,111,284.70, with accrued interest, would be made if they were now living would be the communal owners of the Cherokee lands east of the Mississippi. By the tripartite treaty of 1846 the Western and the Eastern Cherokees were placed on the same footing with regard to all lands east of the Mississippi and with regard to the funds derived from them. It follows necessarily that each and all of the present communal owners, whether on the east or the west of the Mississippi,

and whether the descendants of Eastern or Western Cherokees, have the same individual interest in the fund and will be entitled to like amount *per capita*.

The appellees, however, contend that the situation of the Cherokees in the above case is in no way analogous to that of the Creeks herein because *pursuant to a treaty* (Treaty of August 6, 1846; 9 Stat. 871) the individual Cherokees, whether Western or Eastern—being all those Cherokees residing East, at the date of the Treaty of 1835 and the supplement of 1836—had a *vested* interest in the balance of the treaty fund; that the terms of the treaty changed the character of the treaty fund, divesting it of its tribal character and vesting the individual Cherokees with an individual interest in it. The appellees further point out that the court, pursuant to a special jurisdictional act, was permitted to apportion the judgment moneys to those Cherokees to whom the money equitably belonged. It is appellees' position that there was no Creek treaty granting to all Creeks vested individual rights in the Creek lands here involved; that the claim here presented is a tribal one and that no individual Creek Indian has any vested interest in it; that any judgment rendered will be set up on the books of the United States Treasury to the credit of petitioner-appellee, the Creek Nation of Indians, and no individual Creek has a vested right in that judgment fund until Congress directs that payment be made per capita to the members of the tribe. Appellees say that the unorganized Eastern Creeks lost their Creek tribal property rights, if they had any, many years before the passage of the Act of February 8, 1887, which purports to save appellants' right to prosecute this claim; that none of the Eastern Creeks were enrolled on the final citizenship rolls of the Creek Nation in 1907 and that only such enrolled Creeks can now claim to be Creek Indians entitled to any distribution of Creek tribal property.

If the claim in question arose out of treaties between the United States and the tribal organization of the Creek

Nation which existed in Oklahoma, we might be persuaded by these arguments. But the land in question belonged to the Creek Nation in 1814, and the Creek Nation of the 1907 roll was in no sense the full successor to that Nation so far as the treaty of 1814 is concerned. The claim arising out of the disposition of that eastern property belongs more as does property of an intestate in the case of heirs of equal degree of relationship. The new Creek Nation was formed as a governing body to attend to the affairs and property of the Creeks in Oklahoma. It is true that this claim is not vested by treaty expressly, as in the case of the Cherokees, and there is no jurisdictional act calling for the apportionment of the judgment moneys to those to whom the money *equitably* belongs—but the right to proceed against the Government for the injury which was to all the 1814 Creeks, arises by virtue of the fair and honorable dealings provision in the Indian Claims Commission Act, and in our opinion it arises, if at all, in favor of *all* those who were injured by such dealings, or their descendants. Although the Government dealt exclusively with the appellee the Creek Nation, subsequent to 1833, it dealt with the ancestors of both petitioner-appellee and appellants with respect to the particular property in suit, and there has been no occasion for further dealings with appellants since 1832. At the time the claim arose appellants were a part of the Creek Nation.

But appellees contend, and the Commission has ruled, that appellants are not an identifiable group within the meaning of the Indian Claims Commission Act. The Commission's principal reason for holding that the appellants are not an "identifiable group of Indians" is that they have no "common claim" but rather have individual claims which they wish to settle in a common suit.

The Creek Nation east of the Mississippi which appellants represent is, in our opinion, an "identifiable group" within the meaning of Sec. 2, of the Indian Claims Commission Act; that is, this group can be identified at this time as

a group of Indians consisting of the descendants of a portion of the Creek Nation as it existed in 1814. To identify is to establish the identity of, and if a group presenting a claim under the Act is capable of being identified as a group of Indians consisting of the descendants of members of the tribes or bands which existed at the time the claim arose, the jurisdictional requirements of the statute, in our opinion, have been met. It would, we think, be a strained and unwarranted interpretation of the Act to say that Congress intended by the term "identifiable group" that the group making the claim must be identical, as a distinct entity, with the tribe or band existing at the time the claim arose. Such interpretation would make the term "identifiable group" mean nothing more than a recognized tribe or band. Clyde F. Thompson, et al., on the relation of the Indians of California, Appeal No. 9, decided this day.

The injury complained of by the petitioner-appellee which is an organized tribe, and by appellants who, until recently, were unorganized, was an injury to a tribal or group right. In 1814 the land said to have been taken by the United States, under the treaty, was tribal property. The Commission has ruled, and this court has always taken the view, that a claim for the taking of tribal lands is a common claim, the ownership of the land being tribal and not individual. It is the nature of the ownership of the land at the time taken that determines the character of the claim arising from that taking. If the ownership was in individual members of the tribe in 1814, and the injury thus to those individuals, the later forming of a tribal organization to include such members or their descendants would not transform individual claims into a common claim or the individual injury into a common one. On the other hand, if the claim when it arose was a tribal or common one, the later disbanding of the entire tribe and the complete absence of a tribal organization as a political entity at the time of suit on the old tribal claim, would not affect the character of the claim as a tribal claim. In the instant case,

a portion of the membership of the 1814 tribe banded together in a separate political organization *after* the injury to the tribal property occurred, and the remaining members of the 1814 tribe abandoned all tribal organization and became United States citizens. These circumstances did not, we think, alter the tribal or common nature of the injury or the claim therefrom. The further fact that the United States has never recognized by treaty or otherwise the recently formed tribal organization of Eastern Creeks, does not, we think, defeat their right to present a claim to the Indian Claims Commission as an identifiable group, inasmuch as they are seeking to become parties-plaintiff on a common or tribal claim, as representatives of the descendants of a large group of members of a tribe which was recognized by the United States, and the claim arose out of a treaty between such recognized tribe and the United States. If the Eastern Creeks cannot intervene and become parties in the suit on this claim because, as a group, they have never been recognized by or participated in treaties with the United States, since 1832, then it would appear that the Creek Nation west of the Mississippi also would have no standing to sue because, as presently constituted, that nation was not a treaty party in 1814, when the property in question was ceded. In Red Lake, Pembina and White Earth Bands, Ind. Cl. Com. Docket No. 18-A (September 17, 1951), the Pembina Indians were an organized band recognized as such by the United States at the time of the treaty in suit. The Government contended that because the Pembina Band ceased to exist as an organized tribe in 1891, no identifiable group or band was in existence to bring suit before the Commission. In holding that the Pembina Indians were entitled to sue, the Commission said:

> • • • claimants who are permitted to assert claims under the Indian Claims Commission Act, namely, a "tribe, band, or other identifiable group" do not have to be existing political groups in order to be heard by the Commission. The controlling question is whether

the claimant group can be identified and have a common claim .* * *

As the plaintiffs concede that the Pembina Indians are no longer organized as a band, the question then is whether members, or descendants of members of the Pembina Band as it existed and was recognized at the time of the 1863 treaty, can be identified. If they can be so identified, then any one of their group is authorized by express statute to present this claim as a representative of all the members, as provided by Section 10 of the Indian Claims Commission Act (25 U. S. C. 70a), which provides that: "any claims within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representatives of all its members."

We believe that it is such a representative action that is presented here. It is true that in the caption of the petition the Pembina Band is named as one of the plaintiff bands, which would indicate that the claim was presented by an existing organized band; however, the allegations of the petition clearly show that this claim is presented by individual members, or descendants of members, of the Pembina Band or Group of Chippewa Indians which was a party to the 1863 treaty cession of lands, out of which this claim arises, and that they are acting as the representatives of all the members or descendants of members of said band.

Accepting as true the allegation of appellants that they represent the descendants of those members of the Creek Nation in 1814 who remained east of the Mississippi River, it would appear to be both proper and necessary that the eastern group be allowed to intervene by their representatives in order that all those who may be legally entitled to share in a possible recovery for the injury to their common ancestors, be before the Commission. A continuous

integrated process of litigation is greatly to be desired in settling these Indian claims, and the allowance of the intervention by a group who claims an interest in the judgment or who will be adversely affected by its disposition, is one of the steps in the attainment of this objective. As a matter of justice, and to bring about a thorough administration of the law laid down by the Indian Claims Commission Act, we think that where all interested persons have not been made parties to the proceeding by joining in the original petition, the Commission has full power to allow such persons, constituting an identifiable group of Indians such as we have here, to intervene or be made parties regardless of the lack of specific language to that effect in the Act, or the failure of the Commission to formulate rules relating to intervention.

The Commission and the appellees appear to take the position that because a tribal organization of Creek Indians does exist which has been recognized by the Secretary of Interior it must be the representative of all Creek Indians and have the exclusive privilege of presenting any claim for such Indians. The Creek Nation in Oklahoma has only been *recognized* by the Secretary of Interior as having authority to represent the Creek Indians in Oklahoma. It has never been recognized as having authority to represent the unorganized but identifiable group of Creeks east of the Mississippi, and therefore is not entitled under the Indian Claims Commission Act to the exclusive right of representing such Eastern Creeks. Accordingly, the group of Eastern Creeks are entitled to be represented separately by representatives of their choosing. The legislative history of the Indian Claims Commission Act and the language of the Act itself indicate that it was the intention of Congress to provide for the complete and expeditious settlement of all just and equitable Indian claims, and denial of intervention to the representatives of the descendants of a group constituting a portion of the Creek Nation as it existed in 1814, in a suit involving an injury to that Nation, would defeat such purpose.

But the Commission concluded that there was a further difficulty to permitting intervention, in that its jurisdiction does not extend to defining the identity of individuals entitled to share in any award made. We do not believe that taken as a whole, the petition of the intervenors requires the Commission to determine the identity of the individual Indians who may participate in any award made. We think rather that the petition to intervene raises the question whether only the petitioner-appellee and its members are entitled to prosecute the claim arising under the 1814 treaty, or whether the representatives of the entire Creek Nation, as it was constituted in 1814, are the proper parties to prosecute the claim. This issue of fact and law regarding the ownership of the claim is threshold to a proper and complete determination of the claim arising out of the treaty of 1814. Although both the Government and the appellee contend that the Commission has no jurisdiction to try this issue, the Commission has in fact decided it as follows:

> • • • We are of the opinion that the petitioner in this case has the exclusive right to prosecute the claim here asserted.

The Government and the petitioner-appellee appear to agree with that holding of the Commission and are asking that it be affirmed. At the same time, they take the position that if this court should disagree with the Commission's holding, reversal should not follow because the Commision had no jurisdiction to try such an issue in the first place. As we have stated above, the Commission had full power to determine such an issue. Appellants suggest that the proper procedure would have been for the Commission to permit intervention and then, after a trial, decide the issue of whether the claim sued on is the property of the Creek Nation in Oklahoma, or, as appellants contend, the property of the descendants of the entire Creek Nation as it existed in 1814. We agree that this would have been the preferable procedure. Inasmuch as such a course was not followed, however, we have no choice but to pass on what the Com-

mission has in fact done, and we believe that the record before us is sufficient for that purpose.

In summary, we hold first that it was within the power of the Commission to allow the motion to intervene and that under the circumstances of this case, the motion should have been allowed. Next, we hold that the Commission erred in holding that the petitioner-appellee has the exclusive right to prosecute the claim here asserted. Although, as suggested by appellants, this decision of the Commission may have been premature; the record before the Commission and now before the court indicates, and we hold, that if there was an injury inflicted by the 1814 treaty, it was an injury to the Creek Nation as it was then constituted, and that any recovery for such injury should be for the benefit of all the descendants of that nation and not for the exclusive benefit of the organized tribe or nation in Oklahoma. And, finally, we hold that in the event of an award for such an injury, it should be for the benefit of all descendants of the Creek Nation as it was constituted in 1814, and recognized by the United States in the treaty of cession of that year, the method of determining the identity of such descendants to be provided for by Congress in making an appropriation to pay the award.[20]

The decision of the Indian Claims Commission denying appellants' motion to intervene is reversed, and the case remanded to the Commission for further proceedings in accordance with this opinion.

Howell, *Judge;* Madden, *Judge;* Whitaker, *Judge;* and Jones, *Chief Judge,* concur.

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20. Indians of California v. The United States, 98 C. Cls. 583, cert. den. 319 U. S. 764.

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413741—57——1

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 648

THE YUCHI (EUCHEE) TRIBE OF INDIANS, AND S. W. BROWN, LEGUS BROWN, WILLIE TIGER, FRED SKEETER AND JESSE JAMES, MEMBERS OF SAID TRIBE, BAND OR GROUP OF INDIANS, FOR THEMSELVES AND ALL OTHER MEMBERS OF SAID TRIBE, BAND OR GROUP OF INDIANS, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Indian Claims Commission (Pet. Separate App. 78–87) is reported in 3 Ind. Cl. Comm. 515. The Commission's findings of fact (App. *infra*, pp. 9–16) are reported in 3 Ind. Cl. Comm. 506. The opinion of the Court of Claims (Pet. App. 19–37) is reported at 145 F. Supp. 206.

JURISDICTION

The judgment of the Court of Claims was entered October 2, 1956. The petition for a writ of certiorari was filed on December 22, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 and section 20 (c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U. S. C. 70s.

QUESTION PRESENTED

Whether the tribunals below erred in concluding that petitioner is a constituent part of the Creek Nation, that title to the property in suit was never held by petitioner but by the Creek Nation, and that petitioner is not entitled to prosecute a claim for an alleged taking of such property.

STATUTE INVOLVED

The pertinent provisions of the Indian Claims Commission Act, 60 Stat. 1049, 25 U. S. C. 70, *et seq.*, are as follows:

JURISDICTION

> SEC. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: * * *
>
> * * * * *
>
> PRESENTATION OF CLAIMS
>
> SEC. 10. Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the repre-

sentative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.

STATEMENT

The history of this case is set forth in the opinion of the Court of Claims (Pet. App. 19–22) and may be summarized as follows: In January 1948, the Creek Nation of Oklahoma, on behalf of descendants of the Creek Nation of 1814 now residing in Oklahoma, filed a petition (Docket No. 21, Ind. Cl. Comm.) under the Indian Claims Commission Act, 60 Stat. 1049, 25 U. S. C. 70, to recover for some 23,000,000 acres of Creek lands in Alabama and Georgia, acquired by the United States by the Treaty of August 9, 1814, 7 Stat. 120, also known as the Treaty of Fort Jackson. The complaint in this action alleged that the lands were acquired by the United States without compensation and contrary to the Government's obligation to deal fairly and honorably with the Indians.

In January 1951, the Creek Nation East moved for leave to intervene on behalf of descendants of the Creek Nation living east of the Mississippi. Denial of leave by the Commission was reversed by the Court of Claims, *C. W. McGhee, et al.* v. *United States,* 122 C. Cls. 380, and certiorari was denied, 344 U. S. 856. On December 21, 1953, an order was entered permit-

ting intervention. Prior to this, on April 22, 1952, the Commission had rendered an interlocutory judgment allowing recovery for approximately 9,000,000 acres of the 23,000,000 sued for by the Creek Nation.

This was the status of proceedings in Docket No. 21 prior to consolidation with the instant suit by petitioner, which came about as follows: On July 27, 1951, petitioner Yuchi Tribe filed an action (Docket No. 172) seeking recovery for itself as the sole owner of approximately 11,000,000 acres of land. The land claimed by petitioner embraced part of the 23,000,000 acres sued for by the Creek Nation in Docket No. 21 (including the land for which an interlocutory judgment was entered in that proceeding). The balance of the 11,000,000 acres sued for by petitioner consisted of land which had been ceded by the Creek Nation to the United States by the Treaty of June 16, 1802, 7 Stat. 68, which land was not included in Docket No. 21. In December 1953, on the Government's motion, petitioner's action, Docket No. 172, was consolidated with Docket No. 21, and further hearings were had in the matter. In May and December 1955, the Commission entered additional findings of fact increasing the acreage for which recovery could be had in Docket No. 21 and providing that the judgment should be for the benefit of all descendants of the Creek Nation as constituted in 1814 and recognized by the United States by the Treaty of that year.

In Docket No. 172, petitioner's action, the Commission entered findings and an opinion on May 16, 1955 (App. *infra*, pp. 9–16; Pet. Separate App. 78–87). The findings, in broad outline, are as fol-

lows: Prior to 1733, the Yuchi were an independent ethnic group from the Muskogee Tribes which originally composed the Creek Confederacy, later the Creek Nation. The Yuchi were located in Tennessee and were not the aboriginal owners of any of the Creek Tribal lands in Alabama and Georgia. Early in the 18th Century, the Yuchi moved on to Creek lands and were incorporated into the Creek Confederacy as early as 1751 as a lower Creek Town under the general government of the Creek Nation, losing their independence and becoming integral parts of the Creek Nation. The Government of the Creek Nation rested in its National Council. Following centralization of the Creek Government, title was considered to be in the Creek Nation as a whole; no cessions could be made except when agreed to in council and consent of the National Council was thus obtained (Fdgs. 1–6, *infra,* pp. 9–11).

The Creek Nation exercised absolute sovereignty over all Creek lands in Alabama and Georgia, and by treaties with Georgia in 1733 and 1739, the Creek Nation ceded lands and proclaimed that the lands belonged to it by ancient right. The United States entered into the Treaty of August 7, 1790, 7 Stat. 35, with the Creek Nation guaranteeing to the Nation the lands there identified, which included the lands here involved. Numerous other treaties were subsequently negotiated by the United States with the Creek Nation between 1796 and 1832, for the cessions of Creek lands. Representatives of the Yuchi signed certain of these treaties, including the 1814 treaty here in question. The Chiefs of the Yuchi towns also

signed a protest by the Creek Nation against that Treaty (Fdg. 7, *infra,* pp. 11–13).

Upon removal of the main body of Creek Indians to the West in 1836 the Yuchi were settled in Indian territory as part of the Creek Nation and as Creek Indians, were enrolled on the Creek Tribal rolls, and have received allotments under federal legislation pertaining to the Creek Tribe. And since 1836, the Yuchi have participated in the Creek National Council and in tribal affairs, the tribal Government being still in existence in modified form (Fdgs. 8–11, App., *infra,* pp. 13–14).

The Commission concluded that petitioner is not an independent Tribe, band, or other identifiable group within the meaning of the Indian Claims Commission Act, but is a constituent part of the Creek Nation, that petitioner never had title to the lands in question, that petitioner had no claim in its own right, and dismissed its petition.[1] The Court of Claims affirmed, analyzing carefully the relevant history of the Creek Nation (Pet. App. 19–37).

ARGUMENT

The conclusion of the Commission was based on its findings of fact (*infra,* pp. 9–16), and the Court of Claims stated (Pet. App. 25) that "[a]fter thoroughly reviewing the record in this case, the court is of the opinion that the findings of fact and conclusion of law are well supported by substantial evidence in the record as a whole, * * *."

[1] In its opinion the Commission held that the Yuchis will be beneficiaries of any judgment awarded in Docket No. 21 (Pet. Separate App. 86–87).

It is obvious that the factual background outlined above fully warrants the conclusion of the tribunals below that, long prior to the 1802 and 1814 Treaties, the petitioner became a constituent part of the Creek Nation, subject to its control, and that title to the lands was at that time recognized, even by petitioner's ancestors, as being in the Creek Nation and not in the petitioner. The contemporaneous understanding of that date, held by the Creek Nation, the Yuchis themselves, and the United States, that title to all tribal lands was in the Nation, is not to be overthrown by unfounded theories now developed by petitioner. Petitioner's present claim to title as having been acquired by treaty with the United States (Pet. 8), is, as the court below noted (Pet. App. 33–35), shown to be fallacious merely by looking to the language of the treaties. And, as that court further found (Pet. App. 35–36), petitioner's claim of exclusive possession, even if supported, would not establish title to the land in question. Moreover, contrary to petitioner's contention (Pet. 9–10), there is no conflict between the decision below and prior decisions of this Court.

Finally, there is no merit to petitioner's assertion (Pet. 15–18) that in this case the Indian Claims Commission has veered from acceptable judicial practice. The matters referred to are mere assertions that error resides in the determination of issues which the Commission unquestionably has jurisdiction to decide. Furthermore, these are questions not presented in petitioner's case but in Docket No.

21, and are irrelevant here. Assuming that petitioner has any standing to raise such questions, there is nothing in the decisions below which precludes it from raising them in the first instance in the tribunals below in Docket No. 21.[2]

CONCLUSION

The decision below is correct and there is no conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
FRED W. SMITH,
Attorneys.

JANUARY 1957.

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[2] Docket No. 21 has not been finally disposed of by the Commission. Contrary to the suggestion of petitioner (Pet. 17–18), the amount of recovery has not been determined. As the Court of Claims noted (Pet. App. 21), that question is still to be heard and decided.

APPENDIX

The findings of fact by the Indian Claims Commission dated May 16, 1955, 3 Ind. Cl. Comm. 506, are as follows:

FINDINGS OF FACT

The Commission makes the following Findings of Fact:

1. Before their incorporation into the Creek Nation the Yuchis were an independent ethnic group of Indians from those of the Muskogee which constituted the large majority of the tribes which originally composed the Creek Confederacy.

They were not the aboriginal owners of any lands which constituted the tribal domain of the Creek Nation in Georgia and Alabama. The town of Cofitachequi, formerly believed to be Yuchi, was the Muskogee town of Kasihta, one of the most ancient and influential towns of the Creek Nation. The Yuchis came into the Creek domain probably between 1733 and 1751.

2. In the early part of the eighteenth century the Yuchis split up into small groups, left their own territory in Tennessee and settled among the Creeks and on Creek domain in Georgia and Alabama, and in West Florida. About 1761 the Florida group moved to the Upper Creek country and settled near Tuckabahchee. A second band, called Hogologe, settled on the Savannah River above Augusta. In 1716 they moved to the Chattahoochee with the Creeks, and thence to the Tallapoosa, settling near the Shawnee towns among the Upper Creeks. After the Yamasee War a group of Yuchi left

Tennessee and settled on Creek land along the Lower Savannah in Georgia, between Silver-Bluff and Ebenezer Creek. In 1729 the Yuchi town was founded on the right bank of the Chattahoochee River in Creek territory, between the Lower Creek towns of Cowetuh Tallauhassee and Ooseoochee, and thereafter this group moved to this location and became consolidated into the well-known Yuchi town among the Lower Creeks.

3. The Muscogee Tribes which originally formed the Creek Confederacy, later called the Creek Nation, were the aboriginal owners of practically all of the lands which now constitute the States of Georgia and Alabama. These tribes were occupants of this area when De Soto passed through their country in 1540. The Creek Confederacy was in existence in 1540, and was in a flourishing condition in 1670 when the English settled in South Carolina.

4. The Yuchi were incorporated into the Creek Confederacy by 1751, either by conquest, or as a means of self preservation.

By their incorporation into the Creek Nation they became known as a Lower Creek town, and were thereafter enrolled as such, and were under the general government of the Creek Nation and subject to its laws. They were permitted to have their own chiefs, and to retain their own customs, and the right of local self government, as was the custom in the other Creek towns. In other words, they became a constituent part of the Creek Nation, and became for all intents and purposes Creek Indians losing the independence which they formerly enjoyed as an independent tribe. The tribes received by the Creeks became integral parts of the Creek Nation.

As a constituent member of the Creek Nation the Yuchis had the privilege of living and hunting anywhere on the Creek domain.

5. The government of the Creek Nation rested in the National Council, composed of the Chiefs of the several towns constituting the Creek Nation. Attendance of the chiefs at these councils was not compulsory. The original Muskogee, or "mother" towns, had the principal direction of national affairs. Councils were usually held once a year, or when occasion demanded, wherein matters affecting the nation were deliberated upon and decided by the Chiefs in attendance, and their decision was binding on the nation.

While the government of the Creek Nation was originally a loose organization, with the advent of the white man this government became centralized in the national council.

6. The Creek Nation had definite laws governing the cession of their lands. Originally title to the Creek domain was considered to be in the aboriginal Creek towns, yet with the centralization of the Creek Government title was considered to be in the Creek Nation as a whole.

No cessions of Creek domain could be made by any one or two towns, but could only be made when agreed to in council, and the consent of the Creek National Council thus obtained.

In 1811 the Creek National Council passed a law prohibiting the sale of any Creek land without the consent of the national council, and providing a death penalty for any of the Chiefs of the towns who would violate that law. This law was binding upon the Chiefs of the tribal towns in the Creek Nation, and was in force at the time of the Treaty of Fort Jackson.

7. The Creek Nation has exercised the right of absolute sovereignty over all of these Creek lands in Georgia and Alabama, ever since the Yuchis were incorporated into the Creek Nation, which right was recognized by the United States in all of its dealings with the Creek Nation.

In 1733 and 1739 the Creek Nation executed two treaties with Oglethorpe, acting for the Colony of Georgia. In the Treaty of 1733 the Creek Nation ceded to the Colony large tracts of land between the Savannah and the Altamaha Rivers; and in the Treaty of 1739 it was declared that the lands therein described did by ancient right belong to the Creek Nation.

The Treaty of August 7, 1790, was executed by the United States with the Creek Nation, and in this treaty the United States solemnly guaranteed to the Creek Nation the lands southward and westward of the eastern boundary of the Creek domain thus fixed, which include the lands involved in this suit.

Thereafter the Treaties of June 29, 1796 (7 Stat. 56; 2 Kapp. 46); June 16, 1802 (7 Stat. 68, 2 Kapp. 58); November 14, 1805 (7 Stat. 96; 2 Kapp. 85); August 9, 1814 (7 Stat. 120, 2 Kapp. 107); January 22, 1818 (7 Stat. 171, 2 Kapp. 155); January 8, 1821 (7 Stat. 215, 2 Kapp. 195); January 24, 1826 (7 Stat. 286; 2 Kapp. 264); November 15, 1827 (7 Stat. 307; 2 Kapp. 284); and March 24, 1832 (7 Stat. 366, 2 Kapp. 341), were executed by the United States with the Creek Nation for the cessions of Creek lands guaranteed to the Creek Nation by the Treaty of 1790, east of the Mississippi River and in what are now the States of Georgia and Alabama.

Representatives of the Yuchi town of the Creek Nation, recognized as a constituent part of that nation, were in attendance at the treaty councils leading to the execution of the above Treaties of June 26, 1796, and August 9, 1814, and representatives of that town signed said Treaties of 1796 and 1814, and also the Treaties of 1826 and 1827, along with the representatives of the other Creek towns of the Creek Nation. Thus the Yuchi confirmed the right of the Creek Nation as a whole to dispose of Creek lands, and further recognized the fact that the

Yuchi, as such, had no exclusive rights to any of the Creek domain ceded by said Creek Nation; and that the right of the Creek Nation as a whole was paramount.

The Chiefs of the Yuchi town of the Creek Nation signed the protest of the Creek Nation to the Treaty of Fort Jackson, and thus acknowledged that the Yuchi, as a separate entity, were not the owners of any of the Creek domain ceded by the treaty. They admitted also that the Creek Nation, led in council by the older and more ancient Creek towns, was the master of the Creek lands.

8. Upon the removal of the main body of Creek Indians to the West in 1836, the Yuchi as a constituent part of the Creek Nation and as Creek Indians (not as Yuchi) were settled upon Creek domain in Indian Territory, now a part of the State of Oklahoma. Here also the Yuchi were represented in the Creek National Council, and continued to be governed by Creek laws. Under the constitutional form of Creek Government adopted by the Creek Nation in 1867 the Yuchi took a prominent part in Creek affairs, and some of the members of the Yuchi town of Creek Indians held high offices in that Creek Government.

9. The Yuchi were enrolled upon the Creek tribal rolls prepared by the Creek Government in 1890, and were later enrolled by the Dawes Commission as members of the Creek Nation under the Act of June 28, 1898 (30 Stat. 495), and the Creek Agreement of March 8, 1900, approved by the Act of March 1, 1901 (31 Stat. 861), and were thereafter allotted Creek lands as members of the Creek Nation in Oklahoma.

10. The Government of the Creek Nation was continued in modified form under Section 28 of the Act of April 26, 1906 (34 Stat. 137), and as modified is in existence today.

The present government of the Creek Nation is composed of a principal chief, elected by the

members of the Creek Nation every four years, and formally commissioned as such by the President of the United States under Section 28 of the Act of April 26, 1906 (34 Stat. 137). There is also a Creek Tribal Council composed of duly elected representatives of each of the 44 tribal towns in the Creek Nation. The Yuchi town is represented in this Council by Legus Brown and Willie Tiger. The Yuchis participate in the election of the principal chief of the Creek Nation, who represents the Yuchis as well as all the other constituent parts of the Creek Nation.

11. By action of the Creek Tribal Council the present attorney of record for the Creek Nation in Docket 21 was selected to represent the Creek Nation before the Indian Claims Commission, and by appropriate resolution dated August 29, 1946, approved said contract with said Paul M. Niebell for this purpose. This resolution was approved by the principal chief of the Creek Nation, who was also one of the representatives of the Creek Nation signing the contract on behalf of the Creek Nation. This contract dated August 28, 1946, was duly approved by the Commissioner of Indian Affairs on November 20, 1947, and is now on file with the Indian Claims Commission. The Yuchi Indians, being a constituent part of the Creek Nation, are represented by Docket 21 by the duly authorized attorney for said Creek Nation in said case.

12. The contract with counsel for the Yuchi was approved by the Commissioner of Indian Affairs on June 15, 1951, with the following condition:

"The approval of this contract shall not be construed as a recognition of the Yuchi or Euchee Tribe of Indians of Oklahoma as an identifiable group of American Indians for the purpose of the Indian Claims Commission Act."

13. There is no substantial proof in the record to show that the Yuchis were the aboriginal owners of, or had any exclusive rights in, any of the land ceded to the United States by the Creek Nation by the Treaty of August 9, 1814, which is involved in this suit.

The proof shows that all of this land was solemnly guaranteed by the United States to the Creek Nation as a whole by the Treaties of August 7, 1790, and June 29, 1796. Said lands were owned, occupied, and controlled by the Creek Nation.

14. The Fort Jackson Treaty of August 9, 1814 (7 Stat. 120) cedes as territory belonging to the Creek Nation described as follows:

"Beginning at a point on the eastern bank of the Coosa river, where the south boundary line of the Cherokee nation crosses the same; running from thence down the said Coosa river with its eastern bank according to its various meanders to a point one mile above the mouth of Cedar creek, at Fort Williams, thence east two miles, thence south two miles, thence west to the eastern bank of the said Coosa river, thence down the eastern bank thereof according to its various meanders to a point opposite the upper end of the great falls, (called by the natives Woetumka,) thence east from a true meridian line to a point due north of the mouth of Ofucshee, thence south by a like meridian line to the mouth of the Ofucshee on the south side of the Tallapoosa river, thence up the same, according to its various meanders, to a point where a direct course will cross the same at the distance of ten miles from the mouth thereof, thence a direct line to the mouth of Summochico creek, which empties into the Chatahouchie river on the east side thereof below the Eufaulau town, thence east from a true meridian line to a point which shall intersect the line now dividing the lands claimed by the said Creek nation from those claimed and owned

by the state of Georgia: Provided, nevertheless, that where any possession of any chief or warrior of the Creek nation, who shall have been friendly to the United States during the war, and taken an active part therein, shall be within the territory ceded by these articles to the United States, every such person shall be entitled to a reservation of land within the said territory of one mile square, to include his improvements as near the centre thereof as may be, which shall inure to the said chief or warrior, and his descendants, so long as he or they shall continue to occupy the same, who shall be protected by and subject to the laws of the United States; but upon the voluntary abandonment thereof, by such possessor or his descendants, the right of occupancy or possession of said lands shall devolve to the United States, and be identified with the right of property ceded hereby. (This is Area 75 in Royce)."

15. The territories for which claimants assert compensation in this case are described in Par. 13 of Claimants' Petition as follows:

"13. The lands taken from the predecessors of claimants by the Treaty of August 9, 1814, is described as follows, to-wit:

"Commencing at a point on the Atlantic coast in the State of Georgia due East from the most southerly part of the Jackson line thence West across the States of Georgia and Alabama to the Tombigby River; thence down that River to the old line of the Spanish domain; thence East, South and East along that line to the Atlantic Ocean thence Northerly up the coast to the place of beginning, containing more than 11,200,000 acres."

U. S. GOVERNMENT PRINTING OFFICE: 1937

Office - Supreme Court, U.
FILED
JAN 22 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. 648

THE YUCHI (EUCHEE) TRIBE OF INDIANS, and S. W. BROWN, LEGUS BROWN, WILLIE TIGER, FRED SKEETER and JESSE JAMES, members of said Tribe, Band or Group of Indians, for themselves and all other members of said Tribe, Band or Group of Indians, *Petitioners*,

v.

THE UNITED STATES OF AMERICA, *Respondent*,

Consolidated for trial below with Docket No. 21 before the Indian Claims Commission:

THE CREEK NATION OF OKLAHOMA, *Respondent*,

v.

THE UNITED STATES OF AMERICA, *Respondent*,

Interpleader in Docket No. 21,

THE CREEK NATION EAST, *Respondent*.

BRIEF OF RESPONDENTS THE CREEK NATION OF OKLAHOMA AND THE CREEK NATION EAST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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Supreme Court of the United States

October Term, 1956

No. 648

THE YUCHI (EUCHEE) TRIBE OF INDIANS, and S. W. BROWN, LEGUS BROWN, WILLIE TIGER, FRED SKEETER and JESSE JAMES, members of said Tribe, Band or Group of Indians, for themselves and all other members of said Tribe, Band or Group of Indians, *Petitioners,*

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Interpleader in Docket No. 21,

CREEK NATION EAST, *Respondent.*

BRIEF OF RESPONDENTS THE CREEK NATION OF OKLAHOMA AND THE CREEK NATION EAST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents, The Creek Nation of Oklahoma and the Creek Nation East, respectively urge this Court to deny

the petition for writ of certiorari to the United States Court of Claims in the above cause.

Respondents point out that there are numerous printing errors in said petition and in the separate appendix filed by petitioner. Respondents do not enumerate these errors because for the most part they have no material affect on, and are not pertinent[1] to any question raised herein. However, respondents will set forth below the errors which are material and pertinent.

STATEMENT OF FACTS

Docket 21 began on January 29, 1948 when the Creek Nation of Indians in Oklahoma—an organized Indian tribe recognized by the Secretary of the Interior as having authority to represent all the enrolled Creek Indians in Oklahoma, including the Yuchi, petitioner herein, who are descendants of the Creek Nation of 1814—filed its petition with the Indian Claims Commission to recover the value of over 25,000,000 acres of Creek national domain in Alabama, Georgia and Mississippi, wrongfully acquired by the United States by the Treaty with the Creek Nation of August 9, 1814 (7 Stat. 120, 2 Kapp. 107), commonly called the Treaty of Fort Jackson. (R. C. Cl. 13-67).

On January 5, 1951, the Creek Nation East of the Mississippi River moved for leave to intervene in Docket

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[1] The opinion of April 22, 1952 (Pet. Sep. App. 49-64) appears at 2 Ind. Cl. Comm. 98-114. The opinion of May 5, 1955, Docket 21 (Pet. Sep. App. 64-77) appears at 3 Ind. Cl. Comm. 463-478. 3 Ind. Cl. Comm. 445 as cited (Pet. 2) refers to an entirely different case. The citations of jurisdiction in para. 2 (iii) (Pet. 2, 3) are confusing and incorrect. See 20(c) of the Indian Claims Commission Act is the Act of August 13, 1946, c. 959, 60 Stat. 1049, 1054; 25 U.S.C. 70s(c) instead of 60 Stat. 1049, 25 U.S.C. 70 (Pet. 3, footnote 1). Furthermore, the citation quotes "Act of June 25, 1848, c. 646, 62 Stat. 928" (Pet. 3), which should read "Act of June 25, 1948, c. 646, sec. 1255, 62 Stat. 928," which is now 28 U.S.C. 1255.

21 on behalf of descendants of the Creek Nation of 1814 who remained in the East after the main body of Creek Indians moved to the West in 1836, and who were not represented in Docket 21 (R. C. Cl. 149-153). This motion as amended was denied by the Indian Claims Commission, and on appeal its decision was reversed by the United States Court of Claims in *C. W. McGhee et al.* v. *United States* (1952), 122 C. Cls. 380; certiorari denied, *Creek Nation et al.* v. *C. W. McGhee et al.*, 344 U. S. 856; 73 S. Ct. 91; 97 L. Ed. 665 Intervention was granted for the reason that the injury alleged in the claim of the Creek Nation in Oklahoma was an injury to the Creek Nation as it was constituted in 1814; that the Creek Nation in Oklahoma represented only those enrolled Creek Indians in Oklahoma (which included the Yuchi), and did not represent Creek Indians otherwise situated. The Court of Claims held in the *McGhee Case* that any recovery should inure to the benefit of all living descendants of the Creek Nation as it existed in 1814 (Pet. Sep. App. 104). On December 21, 1953 an order was entered by the Commission allowing intervention of the Creek Nation East, on the basis of evidence before the Commission in the form of affidavits showing that members of the Creek Nation East were descendants of the Creek Nation of 1814, and therefore were an identifiable group of American Indians as determined by the Court of Claims in the *McGhee case*, and that the persons intervening on behalf of the Creek Nation East were representative of that group and authorized to file a claim under Section 10 of the Indian Claims Commission Act. (R. C. Cl. 146).

While the McGhee case was still pending, on April 22, 1952, the Indian Claims Commission rendered an interlocutory judgment in Docket 21 in favor of the Creek Nation, the original claimant, for the value of 8,849,940 acres of the 25,000,000 acres claimed to have been improperly acquired by the United States. *The Creek*

Nation v. *United States,* Docket 21, 2 Ind. Cls. Comm. 66 (R. C. Cl. 78-133).

On December 29, 1955, on motion for rehearing filed by the Creek Nation East, Intervenor, relating to prior findings of fact and interlocutory judgments in Docket 21, the Commission revised its interlocutory judgment of April 22, 1952, in Docket 21, by increasing the acreage from 8,849,940 to 8,986,653 acres and striking out the dollar value of the award for said land, leaving the value to be determined after a hearing thereon to be held at a future date. *Creek Nation* v. *United States, Docket* 21, 4 Ind. Cls. Comm. 140 (Resp. Br. App. 39-41).

Docket 21 is not now before this Court. The decrees therein are interlocutory in nature and are not now reviewable by this Court. However, the above history of the proceedings in Docket 21 is necessary to a proper understanding of the facts relating to the Yuchi claim set forth below. Only the *final judgment* on the Yuchi claim (Docket 172) of the Indian Claims Commission, as affirmed by the Court of Claims, is now brought into question before this Court by the petition for certiorari (R. C. Cls. 195-214; R. 3-21).

On July 27, 1951 the Yuchi, a constituent part of the Creek Nation in Oklahoma and enrolled as Creek Indians on the official rolls of said Creek Nation, filed a petition (Docket 172) with the Indian Claims Commission seeking recovery in their own right for the value of 11,200,000 acres of land ceded to the United States by the Creek Nation in the Treaties of August 9, 1814, and of June 16, 1802 (7 Stat. 68, 2 Kapp. 58). (R. C. Cls. 1-12). The 11,200,000 acres claimed by the Yuchi included the 8,986,653 acres awarded to the Creek Nation by the interlocutory decree of the Indian Claims Commission of December 29, 1955 in Docket 21. Because of the alleged conflict of ownership thus created by the Yuchi, and the possible multiplicity of liability of the United States, the

Indian Claims Commission, on December 21, 1953, entered an order consolidating Dockets 21 and 172 for purposes of trial only. (R. 5-6; R. C. Cl. 12a-12c; 144-145). Hearings were held in January and April, 1954. Throughout the proceedings the Yuchi had their own counsel, presented their own witnesses and evidence, and were afforded an opportunity for a full and fair hearing on the issues raised in Docket 172 (R. C. Cl. Trans. of Proceedings).

On May 16, 1955, the Indian Claims Commission entered its findings of fact and final opinion dismissing the Yuchi petition (Docket 172), holding that the Yuchi had proven no independent rights in the Creek national domain ceded by the Creek Nation under said Treaty of August 9, 1814; and further finding and holding that as a constituent part of the Creek Nation in Oklahoma the Yuchi are represented in Docket 21 by the duly authorized attorney for said Creek Nation (R. C. Cl. 195-214).

In 1956 the Yuchi appealed from this final decision of the Indian Claims Commission in Docket 172 to the United States Court of Claims (R. C. Cl. 215). In these proceedings the Yuchi were represented by their own counsel (Pet. 19). On October 2, 1956 the Court of Claims affirmed the findings of fact and decision of the Indian Claims Commission dismissing Docket 172, after a thorough review of the whole record (R. 1-21; Pet. 19-37).* Thereafter counsel for the Yuchi filed this petition for writ of certiorari in this Court.

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* A serious error appears in the opinion of the Court of Claims, as printed on lines 7 and 8, page 24 of the Appendix included in the petition for certiorari. The Court of Claims, upon motion made by the United States that the sentence "In our opinion the Commission was right in this conclusion" was an incorrect affirmance of Docket 21, which was still in the interlocutory state and not before the Court, struck this sentence from the opinion (R. 21). This indicates clearly that Docket 21 is not now before this Court.

ARGUMENT

A Writ Of Certiorari Is Never Issued By This Court In Any Case In Which The Conclusions Of Law Therein Are Inseparable From The Findings Of Fact Of The Court Of Claims.

The conclusions of law by the Court of Claims in its decision of October 2, 1956 in the instant case, affirming the opinion and findings of fact of the Indian Claims Commission are inseparable from such findings of fact, and certiorari should not issue (Pet. 25). *United States* v. *Esnault-Pelterie* (1938) 303 U.S. 26, 29, 30; 58 S. Ct. 412, 82 L. Ed. 625. Such conclusions of law in no way conflict with the applicable decisions of this Court cited by petitioner, but are wholly in conformity with such decisions and the other decisions of this Court hereinafter cited by respondents.

A. In its decision of October 2, 1956 the Court of Claims said:

> "After thoroughly reviewing the record in this case, the court is of the opinion that the findings of fact and conclusion of law of the Commission are well supported by substantial evidence in the record as a whole, and therefore, this court affirms the decision of the Commission in * * * 172." (Pet. 25; R. 9).

The pertinent findings affirmed by the Court of Claims are as follows:

> 1. " * * * the Yuchi were a constituent part of the Creek Nation at least as far back as 1733 * * *." (Pet. 26; R. 10).
>
> 2. "Upon being incorporated into the Creek Nation, the Yuchi came under its general government and were subject to its laws * * *. They lost their status as an independent tribe and became an integral part of the nation with the privilege of hunting anywhere within the domain." (Pet. 27; R. 10).
>
> 3. "Originally title to lands within the domain was felt to be in the aboriginal Creek towns, but with the

centralization of the Creek Government title was considered to be in the Creek Nation as a whole. Thereafter, land could be sold or ceded only with the consent of the Creek National Council. Sales or cessions could not be made by any chief or chiefs on their own even though the lands they desired to convey were part of their own town." (Pet. 27; R. 10-11).

4. "Appellant[2] itself admits that all lands were nationally owned after centralization, thus this claim of national ownership of lands would tend to indicate centralization. * * * From these documented facts, there appears to be no doubt that there was a centralized Government prior to 1790 and that its policies were regulatory on the whole nation. Since the Yuchi were a constituent part of the nation since at least 1733, they must be considered subject to the national laws since that time." (Pet. 28, 29; R. 11-12).

5. " * * * the nation long before the period of time in question owned, or claimed to own, all the lands of the domain as common property contrary to appellant's claim of the existence of tribal or *talwa* ownership * * * This right of sovereignty was recognized by the United States in all its dealings with the Creeks and is evidenced by the treaties of 1790, 1796, 1802, 1805, and 1814, and the documentary evidence in the record of events and transactions leading up to the consummation of those treaties." (Pet. 29; R. 12).

This finding on these treaties, that the Creek Nation owned the lands in question, is in accord with two other opinions of this Honorable Court: *Patterson* v. *Jenks* (1829), 2 Pet. (27 U. S.) 92, 93-97, and *Coffee* v. *Groover* (1887), 123 U. S. 1, 13-14, in which this Court made similar findings on these treaties.

In the latter case this Court stated (pp. 13-14):

"The country in the region traversed by this line [Georgia-Florida boundary] was occupied, in the early part of the century, by the nation of Creek Indians, * * * the title of the Creek Nation was extinguished

[2] Yuchi Indians—note furnished by respondents.

throughout most of the southern part of the state by the treaties made with the nation in 1802, 1805, and 1814. 7 Stat. 68, 96, 120."

The above findings of fact are conclusive (Sec. 20(b) of Indian Claims Commission Act, Pet. Sep. App. 41) and this Court has jurisdiction to determine only questions of law, which principle of law petitioner admits (Sec. 20 (c) of Indian Claims Commission Act, Pet. Sep. App. 41). The term "Creek Nation" as used in the Treaties of 1790, 1796 and 1814 has been found as a matter of fact to mean the whole Creek Nation as such, and not many small independent Indian tribes, or to a loose war confederacy of many independent tribes, as claimed by petitioner (Pet. 12-13). Such findings of fact are inseparable from the conclusion of law interpreting said treaties.

The conclusion of law in this case conforms to similar conclusions in cases involving other Indian nations. *Cherokee Nation* v. *Georgia* (1831), 5 Pet. (30 U.S.) 1, 8 L. Ed. 25; *Chitto, et al.* v. *United States*, App. Docket 2-55, decided January 31, 1956, —— C. Cls. ——, 138 F. Supp. 253.

The Indian Claims Commission found in Docket 172 involved in this petition (Resp. Br. App. 31):

> "13. There is no substantial proof in the record to show that the Yuchis were the aboriginal owners of, or had any exclusive rights in, any of the land ceded to the United States by the Creek Nation by the treaty of August 9, 1814, which is involved in this suit.
>
> "The proof shows that all of this land was solemnly guaranteed by the United States to the Creek Nation as a whole by the Treaties of August 7, 1790, and June 29, 1796. Said lands were owned, occupied and controlled by the Creek Nation." (3 Ind. Cl. Comm. 512). (R. C. Cl. 201).

This finding of fact was affirmed by the United States Court of Claims in its decision of October 2, 1956, therefore is not reviewable by this Court.

With respect to the 1790 treaty, the Court of Claims said:

> "The language of the treaty itself and the negotiations that preceded it indicate without a doubt that the Creek Nation as an entity was the body with which the United States was dealing. The United States must have felt that the general council sufficiently regulated the internal affairs of the various tribes or it would have sought out the various tribes and attempted to have dealt with them separately." (Pet. 31; R. 14).

With respect to the Treaty of 1796, the Court of Claims said:

> "* * * The treaty of June 29, 1796, more commonly known as the Treaty of Colerain, was then executed by the United States with the Creeks and was in effect an affirmance of the obligatory nature of the treaty of 1790 on the contracting parties." (Pet. 32; R. 15).

After setting forth the preamble and the purpose of the treaty and Article I of the 1796 treaty (Pet. 33-34), the Court of Claims further said:

> "The language above quoted plus the fact that the treaty was confirmed by the national council further indicates the sovereign quality of the Creek Nation. The fact that the Yuchi signed is their admission that the council was their sovereign and that they were subservient thereto. Thus, the Yuchi claim that the Creek government was not centralized until much later is proved to be in error as well as is their contention that there existed individual tribal ownership rather than national ownership.
>
> "The Yuchi, nevertheless, claim title to the lands and insist that that title was *granted* to them by the treaties of 1790 and 1796. They contend that since the title was not divested before the cessions of 1802 and 1814, they are entitled to recover for the value of the lands thereby ceded. The fallacy of this argument is shown merely by looking to the language of the treaties of 1790 and 1796, and we cannot, therefore, agree with the Yuchi's contentions.

> "A merely cursory reading will show that there are no words of *grant* contained anywhere therein. The purpose of the treaty of 1790 was to establish the boundaries of the Creek Nation. Once established the United States *guaranteed* that all the Creek lands thus defined would be protected. The treaty *granted* nothing to the Yuchi, the Creeks, or anyone else. Article 5 of the treaty of 1790 provides for this guarantee:
>
> 'Article 5. The United States solemnly *guarantee to the Creek nation,* all of their lands within the limits of the United States, to the westward and southward of the boundary described by the preceding article. (Emphasis supplied).'
>
> " * * * It was fully recognized by the United States that the Creek Nation was and had been the owners of the lands." (Pet. 33, 34; R. 15-16).

Petitioner's contention that the Court of Claims in its decision of October 2, 1956, failed to define "Creek Nation" (Pet. 12) in accordance with the definition of this Court in *Montoya* v. *United States* (Pet. 9, 10) not only should be rejected because the findings of fact of the Court of Claims are to the contrary and are conclusive, but also because such findings as shown above are in accord with that definition in *Montoya* v. *United States.*

In quoting from the Montoya case petitioner omitted the following very important sentence which appears immediately after the last sentence quoted by petitioner, which ends with the word "compliment." (Pet. 10):

> "We are more concerned in this case with the meaning of the words 'tribe' and 'band'. By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory, * * *" *Montoya* v. *United States* (1901), 180 U. S. 261, 266.

Thus both the United States Court of Claims (Pet. 27) and the Indian Claims Commission (3 Ind. Cl. Comm. 507,

508) found in accordance with *Montoya* v. *United States* that the Creek Nation was "a group of affiliated tribes possessing a common government". (*Montoya,* op. cit. 265.) Likewise, both the Court of Claims (Pet. 26-29) and the Indian Claims Commission (3 Ind. Cl. Comm. 506-512; Resp. Br. App. 25-31) found that the Yuchi were a Creek tribal town within the Creek Nation and a constituent part thereof at all pertinent times, including 1790, 1796, and 1814.

Petitioner incorrectly attempts to apply the doctrine of liberal interpretation of an Indian treaty in favor of the Indians, and cites in support thereof (Pet. 10) *Squire* v. *Capoeman* (1956), 351 U. S. 1, 76 S. Ct. 611, 100 L. Ed. 883. The issue the Yuchi attempt to raise in Docket 172 is primarily between the Yuchi town of Creek Indians on the one hand and the Creek Nation of Oklahoma and the Creek Nation East of the Mississippi on the other; or, referring to 1790, 1796, and 1814, between the Yuchi town of Creek Indians and the Creek Nation as it then existed. The question really is whether in the event of an award in Docket 21 the United States would be liable to the Creek Nation of 1814 as a whole, or to each of constituent tribal towns of said Creek Nation individually. Therefore, the issue sought to be raised here in the instant case is not particularly between the United States and an Indian tribe or nation, but between the Yuchi town of Creek Indians and the Creek Nation. The doctrine of liberal interpretation has been applied by this Court only against the United States in cases of *doubtful* expressions in treaties between the United States and Indian nations or tribes, and is never applied when the treaty terms are not ambiguous. *Choctaw Nation* v. *United States* (1943), 318 U. S. 423, 431-432; 63 S. Ct. 672; 87 L. Ed. 877; *Northwestern Bands of Shoshone Indians* v. *United States* (1945), 324 U. S. 335, 353; 65 S. Ct. 690; 89 L. Ed. 985. It has never been applied where the alleged issue was between two groups of Indians. *Delaware Indians* v. *Chero-*

Ice Nation (1963), 38 C. Cls. 258, 349-350, modified 69 U. S. 127.

This doctrine is inapplicable in the instant case because both the Indian Claims Commission and the Court of Claims on appeal have found no doubtful expressions in the Creek Treaties of 1790, 1796, 1802, and 1814 (Pet. 28, 31, 33; 3 Ind. Cls. Comm. 517-520). Furthermore, even if these Creek treaties were ambiguous the interpretation thereof by the Indian Claims Commission and the Court of Claims would not be changed on the basis of the facts found in the record.

Respondents call the attention of the Honorable Court to an error of petitioners (Pet. 12) in quoting from Article I, Treaty of 1790. The words "all the individuals, young" should read "all the individuals, young". (See Pet. 8 and Pet. Sup. App. 2). The error, when properly corrected as noted, results in a wholly different meaning attributable to Article I, which meaning is in accord with the decision of the United States Court of Claims of October 2, 1964.

The decision of the Court of Claims of October 2, 1964, and the findings of fact of the Indian Claims Commission are in accord with *Tulee* v. *United States* (1942) 315 U. S. 681, 684 cited by petitioners (Pet. 24). Both the Court of Claims (Pet. 26, 27) and the Indian Claims Commission (3 Ind. Cls. Comm. 506-508) found that the Seminole men of Creek Indians was a constituent part of the Creek Nation. All of the evidence shows that the Seminole were recognized as a part of the Creek Nation by the Creek Nation and also by the United States from the time of their incorporation into the Creek Nation (pp. 6-7, 9-12, 15-16).

In addition to the law that the findings of the Indian Claims Commission as affirmed by the Court of Claims are conclusive under the Indian Claims Commission Act, this Court has repeatedly held that the findings of fact of the United States Court of Claims are final. *United States* v. *Crosby* (1941), 294 U. S. 389, 394, 66 S. Ct. 1062, 90 L. Ed. 1306; *United States* v. *Thirty-four*

of all members of the Creek Nation as it was constituted at the time the 1814 treaty was executed. * * * (Pet. Sep. App. 94).

* * * *

"The Creek Nation east of the Mississippi * * * is, in our opinion, an 'identifiable group' within the meaning of Sec. 2, of the Indian Claims Commission Act; that is, this group can be identified at this time as a group of Indians consisting of the descendants of a portion of the Creek Nation as it existed in 1814." (Pet. Sep. App. 98-99).

"* * * The Creek Nation in Oklahoma has only been recognized by the Secretary of Interior as having authority to represent the Creek Indians in Oklahoma. * * * (Pet. Sep. App. 102).

* * * *

"* * * And, finally, we hold that in the event of an award for such an injury, it should be for the benefit of all descendents of the Creek Nation as it was constituted in 1814, and recognized by the United States in the treaty of cession of that year, the method of determining the identity of such descendants to be provided for by Congress in making an appropriation to pay the award." (Pet. Sep. App. 104).

In conformity with the above holding the *McGhee Case,* the Court of Claims in the instant case correctly stated (Pet. 22):

"* * * the Yuchi were, and still are, part of the Creek Nation; that the Yuchi never had any title to the lands in question; that the Creek Nation was the owner of the lands in 1814 and, therefore, the Yuchi had no cause of action in their own right. The Commission further held that since the Yuchi are descendants of members of the Creek Nation of 1814 and since any award for the lands ceded by the treaty of that year will inure to the benefit of all descendants of the nation as it was then constituted, the Yuchi Tribe will be protected by and be the beneficiaries of any award made in Docket No. 21. It is our opinion that in these conclusions the Commission was clearly right."

Petitioner states that the petition of the Creek Nation of Oklahoma in Docket 21 shows on its face that the Indian Claims Commission does not have jurisdiction to hear and determine that case, and that the Creek Nation of Oklahoma is not the real party in interest (Pet. 6). The fallacy of this statement is shown by the above quoted opinion of the Court of Claims in the *McGhee* case relative to the right of the Creek Nation of Oklahoma to bring suit under Sections 2 and 10 of the Indian Claims Commission Act. Furthermore, the above statement raises a question relating solely to Docket 21 which has not been finally decided by the Indian Claims Commission and is not now before this Court.

As the right of the Creek Nation in Oklahoma to represent the rights of all enrolled Creek Indians in Oklahoma, including the Yuchi, and the right of the Creek Nation East to represent the descendants of Creek Indians who remained East, have finally been settled, the Yuchi cannot now properly raise these issues again. As a constituent part of the Creek Nation of Oklahoma the Yuchi are bound by the decision of the Court in the *McGhee* Case.

II.

The Court Of Claims Herein Followed The Accepted And Usual Course Of Judicial Proceedings.

The petitioner, the self-styled Yuchi Tribe, contend (Pet. 15), that the Court of Claims "has so departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the Indian Claims Commission, as to call for an exercise of this Court's power of supervision".

The petition points to no justification for such a statement, and we submit that there is none.

It is clear from the record that the Indian Claims Commission and the Court of Claims followed exactly the pro-

visions of the Indian Claims Commission Act, and the provisions of this Act quoted by petitioner (Pet. pp. 15-16).

The Indian Claims Commission Act (approved August 13, 1946, c. 959, 60 Stat. 1049, 1050, 1052) provided in part (Pet. Sep. App. 33-36):

> Section 2: "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: • • •"
>
> Section 10: "Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; *but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians*, unless fraud, collusion or laches on the part of such organization be shown to the satisfaction of the Commission." (Italics ours)

Both the Indian Claims Commission and the Court of Claims decisions clearly followed the plain provisions of the above jurisdictional act. Both the Commission and the Court of Claims upheld the paramount right of the Creek Nation as an organized tribe, recognized by the Secretary of Interior in accordance with the above quoted Section 10 over its constituent parts, to prosecute its claim in Docket 21 for lands formerly owned by the Creek Nation of 1814, and of which said nation was wrongfully deprived by the United States under the provisions of a treaty executed under duress, the Treaty of Fort Jackson, dated August 9, 1814, 7 Stat. 120.

The question of whether an organized Indian Nation has the paramount authority over its constituent parts to prosecute its claim against the United States under the Indian

Claims Commission Act has already been passed upon by the Court of Claims in *Seneca Nation of Indians et al.* v. *United States,* (1952) 122 C. Cls. 163. In that case an individual member of the tribe filed a petition on behalf of the Seneca Nation. A subsequent petition was filed on behalf of the Seneca Nation by the duly selected attorneys of said nation, which embodied the claim filed by the individual member. The Court of Claims, in holding that the nation has the paramount right to prosecute the claim, stated (122 C. Cls. 163, 165, 166):

> "Since this petition was filed by attorneys chosen by the Nation to represent it, and since Snyder failed to show authority from the tribe to represent it, the Indian Claims Commission dismissed his petition.
>
> We think this was proper. Of course, an individual, a corporation or a nation is entitled to be represented in court by attorneys of their own choosing. So, when the attorneys they had chosen filed a petition on this claim, this, it would seem, ousted Snyder and his petition.
>
> * * * *
>
> If they [the petitions for the nation] had not been filed in time, Snyder's petition might have been allowed to stand; but when the regularly employed attorneys of the tribe did file a petition covering the same claim, then Snyder's petition had no further standing. This is because the Nation is entitled to be represented by persons of its own choosing.
>
> "This would be so, it would seem, independent of the Indian Claims Commission Act, but that Act gives the 'tribal organization' 'the exclusive privilege of representing such Indians * * *.' Attorneys other than Snyder were employed by the 'tribal organization' to represent the Nation. When they filed a claim embodying the one filed by Snyder, this ousted his right to further prosecute his claim."

That the Indian nation has the right to prosecute a claim on behalf of its constituent parts is well settled. In *Cherokee Nation* v. *United States,* (1905) 40 C. Cls.

252, 327, 328, this point was clearly decided by the Court in the following language:

> " * * * In the present case the Cherokee Nation takes the place, so far as communal ownership is involved, of the chiefs and headmen of the uncivilized tribes. This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their Government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it."

In affirming this holding this Court in *United States* v. *Cherokee Nation* (1906), 202 U. S. 101, 130, stated:

> " * * * The Cherokee Nation, as such, had no interest in the claim, but officially represented the Eastern Cherokees.
>
> * * * *
>
> "We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior, to be distributed directly to the parties entitled to it. * * *"

In a later proceeding in this case this Court again affirmed this holding. See *Eastern Cherokees* v. *United States* (1912), 225 U. S. 572, 575-582.

The facts conclusively found by the Indian Claims Commission, and affirmed by the Court of Claims, after a review of the whole record now before this Court, show that the claim which the Yuchi seek to enforce in Case 172 is one for lands which were owned by the Creek Nation in 1814 as a nation; that these lands were solemnly guaranteed by the United States to the Creek Nation in the Treaties of August 7, 1790 (7 Stat. 35, 2 Kapp. 25), and June 29, 1796, (7 Stat. 56, 2 Kapp. 46), made by the United States solely with the Creek Nation; and that the claim arose solely out of the provisions of the Treaty of

August 9, 1814 (Stat. 120, 2 Kapp. 107), made by the United States with the Creek Nation. Certainly the Creek Nation of Oklahoma, as representative of all of its enrolled members, which include the Yuchi, has the right as an organized nation of American Indians to prosecute its claim against the United States in Docket 21, in a petition filed on behalf of all the enrolled descendants of Creek Indians of 1814 who are now living in Oklahoma, by its duly selected and approved attorney. Certainly, as decided *in the McGhee Case,* the Creek Nation East has the right as the representative of the descendants of Creek Indians living in 1814, and as an identifiable group of American Indians, to represent the interests of Creek Indians who are now residing in the East. Both of these representative entities have been held in the *McGhee Case* to represent all of the descendents of Creek Indians living in 1814, in Docket 21, involving lands which were held by the Creek Nation in communal ownership in 1790, 1796 and 1814.

The other contentions set forth in the petition for certiorari are based upon unsupported conclusions of fact, immaterial matters not properly before this Court on this review, or matters which have heretofore been finally settled in the McGhee case. We will examine these further contentions in the light of the above statement.

The statements in paragraph 2a of the petition (p. 16) are immaterial to the questions in this case. Section 2 of the Indian Claims Commission Act simply authorizes the Indian Claims Commission to hear and determine claims on behalf of an Indian tribe against the United States. The Creek Nation, respondent, has been held to have met this requirement. The Court of Claims in the *McGhee* Case held that the claim inures to the benefit of the descendants of the Creek Nation as it was constituted in 1814, so what happened in 1866 would not affect the right of those to be benefited in Creek case, Docket 21, the interlocutory decree in which is not now before this Court.

The petitioner in this paragraph (2a) further raises the question of participation which has already been determined in the *McGhee* Case. The authority of the government of the Creek Nation in Oklahoma over the Yuchi, as a constituent part of that nation, is fully defined in finding 10 of the Indian Claims Commission, which was affirmed on appeal by the Court of Claims, and which reads as follows (R. C. Cl. 200; Resp. Br. App. 30):

> "The Government of the Creek Nation was continued in modified form under Section 28 of the Act of April 26, 1906, (34 Stat. 137) and as modified is in existence today.
>
> "The present government of the Creek Nation is composed of a principal chief, elected by the members of the Creek Nation every four years, and formally commissioned as such by the President of the United States under Section 28 of the Act of April 26, 1906 (34 Stat. 137). There is also a Creek Tribal Council composed of duly elected representatives of each of the 44 tribal towns in the Creek Nation. The Yuchi town is represented in this Council by Legus Brown and Willie Tiger. The Yuchis participate in the election of the principal chief of the Creek Nation, who represents the Yuchis as well as all the other constituent parts of the Creek Nation."

The selection of the attorney for the Creek Nation made by the Creek Tribal Council, approved by the Principal Chief of the Creek Nation, as found in findings 11-12 of the Indian Claims Commission (R. C. Cl. 200-201; Resp. Br. App. 30-31), is binding on the Yuchi as a constituent part of the Creek Nation in Oklahoma.

The statement in paragraph 2b of the petition (p. 16) that "The Creek Nation of Oklahoma came into existence by the treaty of 1866" is incorrect. The record shows that the Creek Nation, respondent, came into existence long before the Treaty of 1866 (See findings of fact Nos. 8-10 of the Indian Claims Commission in Docket 172, 3 Ind. Cls. Comm. 510, 511, (R. C. Cl. 199-200), which were

affirmed by the Court of Claims (Pet. 22, 37; R. 19). The main body of Creek Indians was removed from the East to the West in 1836, under the provisions of the Treaty of March 24, 1832 (7 Stat. 366, 2 Kapp. 341), between the United States and the Creek Nation. See *Creek Nation* v. *United States* (1933), 77 C. Cls. 226, for the history of this removal. See also the Treaties of January 4, 1845 (9 Stat. 821, 2 Kapp. 550), August 7, 1856 (11 Stat. 699, 2 Kapp. 756), and June 14, 1866 (14 Stat. 785, 2 Kapp. 931), executed by the United States with the Creek Nation in the West.

The contentions set forth in paragraph 2d (Pet. 17-18), are immaterial to Docket 172, and are incorrect. They are immaterial because Docket 21 is not before this Court. Only the consolidated trial record upon which the findings of fact and final decisions in Docket 172 are based are now before this Court. Furthermore, all decisions and decrees in Docket 21 are merely interlocutory and therefore are not reviewable at this time.

The contentions in paragraph 2d (Pet. 17) are incorrect because (1) the Yuchi were not the owners of any of the Creek land ceded under the Treaty of August 9, 1814, 7 Stat. 120 (3 Ind. Cls. Comm. 506, 508-512, R. C. Cl. 195-199); Pet. 22); (2) the respondents do allege facts supporting claims based upon all five clauses of Section 2 of the Indian Claims Commission Act, and not merely under Section 2, clause 5 (R. C. Cl. 13-67, 179-182); (3) respondents do allege and pray for just compensation (R. C. Cl. 26-27); (4) the interlocutory decree of April 22, 1952 in Docket 21 of the Indian Claims Commission in which value was fixed at 20 cents an acre has been withdrawn by a later decree of the Commission dated December 29, 1955 (R. 5; Pet. 20-21). There will be no dilution in view of *McGhee* v. *United States* holding that all descendants of members of the Creek Nation of 1814 would be entitled to participate equally in an award, if

any, in Docket 21, and the Yuchi were and are found to be a part of the Creek Nation, having no independent rights of their own (Pet. 22); (5) and finally, there are no conflicting interests in Docket 21, as clearly found by the Indian Claims Commission in Docket 172, and as affirmed by the Court of Claims; and the Yuchi and other members of the Creek Nation in Oklahoma are properly represented by the duly selected and authorized attorney of the Creek Nation, respondent (3 Ind. Cls. Comm. 512; R. C. Cl. 200, 212-213; R. 6, 19; Pet. 22, 37).

The record before this Court and the facts found by the Commission and Court of Claims show clearly that the decisions in Docket 172 follow the accepted judicial procedure in holding that the Creek Nation in Oklahoma, (of which the Yuchi are a constituent part) which nation has an organized government recognized as such by the Secretary of the Interior and the exclusive privilege of representing said Creek Nation in the presentation of the claim in Docket 21; that this holding is in accord with the decisions of this Court cited above, and in accordance with the holding in the *McGhee* case, supra, in which this court denied certiorari.

III.

The Consolidation Of Dockets 21 And 172 For Trial Was Proper Judicial Procedure.

The other contention of petitioner (Pet. 4) is that the Commission had no jurisdiction to consolidate Docket 172 and Docket 21 for trial.

In its decision the Court of Claims in passing on this question, stated (Pet. 37):

> "The only remaining issue to be discussed is the appellant's assertion that the Indian Claims Commission erred in allowing consolidation of Docket Nos. 21 and 172 for purposes of trial. The only thing that need be said respecting this is that since a situation

existed whereby two groups were laying claim to the same land, The Creek Nation in Docket No. 21, and The Yuchi Tribe of Indians in Docket No. 172, the Commission correctly consolidated the cases as such was necessary to determine who actually owned the land during the period of time in question and to avoid the possibility of multiple liability on the part of the United States."

Section 9 of the Indian Claims Commission Act (Pet. Supp. App. 36) provides:

"The Commission shall have power to establish its own rules of procedure".

On motion of the United States the Indian Claims Commission entered its order of December 21, 1953, consolidating Dockets 172 and 21 for trial (R. C. Cl. 144-145), establishing the rule of procedure to be followed by the parties in said cases.

Such an order entered under the above circumstances is clearly in accord with established judicial procedure. Rule 42 of the Federal Rules of Civil Procedure provides:

"(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Rule 38 of the Court of Claims provides:

"(a) Consolidation: When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. * * *"

Clearly the Commission's order consolidating Dockets 172 and 21 for trial purposes is in accord with estab-

lished judicial procedure, and provides no reason for a review by this Court.

CONCLUSION

For the reasons set forth above we submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 172

THE YUCHI (EUCHEE) TRIBE OF INDIANS, and S. W. BROWN, LEGUS BROWN, JACOB ROLLAND, WILLIE TIGER, FRED SKEETER, JOHN JAMES and JESSE JAMES, all members of said Tribe, band or group of Indians, for themselves and for the use and benefit of all other members of said YUCHI (EUCHEE) TRIBE, band or group of Indians,

Claimants,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Decided: May 16, 1955

FINDINGS OF FACT

The Commission makes the following Findings of Fact:

1. Before their incorporation into the Creek Nation the Yuchis were an independent ethnic group of Indians from those of the Muskogee which constituted the large majority of the tribes which originally composed the Creek Confederacy.

They were not the aboriginal owners of any lands which constituted the tribal domain of the Creek Nation in Georgia and Alabama. The town of Cofitachequi, formerly believed to be Yuchi, was the Muskogee town of Kasihta, one of the most ancient and influential towns of the Creek Nation. The Yuchis came into the Creek domain probably between 1733 and 1751.

2. In the early part of the eighteenth century the Yuchis split up into small groups, left their own territory in Tennessee and settled among the Creeks and on Creek domain in Georgia and Alabama, and in West Florida. About 1761 the Florida group moved to the Upper Creek country and settled near Tuckabahchee. A second band, called Hogologe, settled on the Savannah River above Augusta. In 1716 they moved to the Chattahoochee with the Creeks, and thence to the Tallapoosa, settling near the Shawnee town among the Upper Creeks. After the Yamasee War a group of Yuchi left Tennessee and settled on Creek land along the Lower Savannah in Georgia, between Silver Bluff and Ebenezer Creek. In 1729 the Yuchi town was founded on the right bank of the Chattahoochee River in Creek territory, between the Lower Creek towns of Cowetuh Tallauhassee and Ooseoochee, and thereafter this group moved to this location and became consolidated into the well-known Yuchi town among the Lower Creeks.

3. The Muscogee Tribes which originally formed the Creek Confereracy, later called the Creek Nation, were the aboriginal owners of practically all of the lands which now constitute the States of Georgia and Alabama. These tribes were occupants of this area when De Soto passed through their country in 1540. The Creek Confederacy was in existence in 1540, and was in a flourishing condition in 1670 when the English settled in South Carolina.

4. The Yuchi were incorporated into the Creek Confederacy by 1751, either by conquest, or as a means of self preservation.

By their incorporation into the Creek Nation they became known as a Lower Creek town, and were thereafter enrolled as such, and were under the general government of the Creek Nation and subject to its laws. They were permitted to have their own chiefs, and to retain their own customs, and the right of local self government,

as was the custom in the other Creek towns. In other words, they became a constituent part of the Creek Nation, and became for all intents and purposes Creek Indians losing the independence which they formerly enjoyed as an independent tribe. The tribes received by the Creeks became integral parts of the Creek Nation.

As a constituent member of the Creek Nation the Yuchis had the privilege of living and hunting anywhere on the Creek domain.

5. The government of the Creek Nation rested in the National Council, composed of the Chiefs of the several towns constituting the Creek Nation. Attendance of the chiefs at these councils was not compulsory. The original Muskogee, or "mother " towns, had the principal direction of national affairs. Councils were usually held once a year, or when occasion demanded, wherein matters affecting the nation were deliberated upon and decided by the Chiefs in attendance, and their decision was binding on the nation.

While the government of the Creek Nation was originally a loose organization, with the advent of the white man this government became centralized in the national council.

6. The Creek Nation had definite laws governing the cession of their lands. Originally title to the Creek domain was considered to be in the *aboriginal* Creek towns, yet with the centralization of the Creek Government title was considered to be in the Creek Nation as a whole.

No cessions of Creek domain could be made by any one or two towns, but could only be made when agreed to in council, and the consent of the Creek National Council thus obtained.

In 1811 the Creek National Council passed a law prohibiting the sale of any Creek land without the consent of the national council, and providing a death penalty

for any of the Chiefs of the towns who would violate that law. This law was binding upon the Chiefs of the tribal towns in the Creek Nation, and was in force at the time of the Treaty of Fort Jackson.

7. The Creek Nation has exercised the right of absolute sovereignty over all of these Creek lands in Georgia and Alabama, ever since the Yuchis were incorporated into the Creek Nation, which right was recognized by the United States in all of its dealings with the Creek Nation.

In 1733 and 1739 the Creek Nation executed two treaties with Oglethorpe, acting for the Colony of Georgia. In the Treaty of 1733 the Creek Nation ceded to the Colony large tracts of land between the Savannah and the Altamaha Rivers; and in the Treaty of 1739 it was declared that the lands therein described did by ancient right belong to the Creek Nation.

The Treaty of August 7, 1790 was executed by the United States with the Creek Nation, and in this treaty the United States solemnly guaranteed to the Creek Nation the lands southward and westward of the eastern boundary of the Creek domain thus fixed, which include the lands involved in this suit.

Thereafter the Treaties of June 29, 1796 (7 Stat. 56; 2 Kapp. 46); June 16, 1802 (7 Stat. 68, 2 Kapp. 58); November 14, 1805 (7 Stat. 96; 2 Kapp. 85); August 9, 1814 (7 Stat. 120, 2 Kapp. 107); January 22, 1818 (7 Stat. 171, 2 Kapp. 155); January 8, 1821 (7 Stat. 215, 2 Kapp. 195); January 24, 1826 (7 Stat. 286; 2 Kapp. 264); November 15, 1827 (7 Stat. 307; 2 Kapp. 284); and March 24, 1832 (7 Stat. 366, 2 Kapp. 341), were executed by the United States with the Creek Nation for the cessions of Creek lands guaranteed to the Creek Nation by the Treaty of 1790, east of the Mississippi River and in what are now the States of Georgia and Alabama.

Representatives of the Yuchi town of the Creek Nation, recognized as a constituent part of that nation, were in

attendance at the treaty councils leading to the execution of the above Treaties of June 26, 1796, and August 9, 1814, and representatives of that town signed said Treaties of 1796 and 1814, and also the Treaties of 1826 and 1827, along with the representatives of the other Creek towns of the Creek Nation. Thus the Yuchi confirmed the right of the Creek Nation as a whole to dispose of Creek lands, and further recognized the fact that the Yuchi, as such, had no exclusive rights to any of the Creek domain ceded by said Creek Nation; and that the right of the Creek Nation as a whole was paramount.

The Chiefs of the Yuchi town of the Creek Nation signed the protest of the Creek Nation to the Treaty of Fort Jackson, and thus acknowledged that the Yuchi, as a separate entity, were not the owners of any of the Creek domain ceded by the treaty. They admitted also that the Creek Nation, led in council by the older and more ancient Creek towns, was the master of the Creek lands.

8. Upon the removal of the main body of Creek Indians to the West in 1836, the Yuchi as a constituent part of the Creek Nation and as Creek Indians (not as Yuchi) were settled upon Creek domain in Indian Territory, now a part of the State of Oklahoma. Here also the Yuchi were represented in the Creek National Council, and continued to be governed by Creek laws. Under the constitutional form of Creek Government adopted by the Creek Nation in 1867 the Yuchi took a prominent part in Creek affairs, and some of the members of the Yuchi town of Creek Indians held high offices in that Creek Government.

9. The Yuchi were enrolled upon the Creek tribal rolls prepared by the Creek Government in 1890, and were later enrolled by the Dawes Commission as members of the Creek Nation under the Act of June 28, 1898 (30 Stat. 495), and the Creek Agreement of March 8, 1900, approved by the Act of March 1, 1901 (31 Stat. 861), and were thereafter allotted Creek lands as members of the Creek Nation in Oklahoma.

10. The Government of the Creek Nation was continued in modified form under Section 28 of the Act of April 26, 1906, (34 Stat. 137) and as modified is in existence today.

The present government of the Creek Nation is composed of a principal chief, elected by the members of the Creek Nation every four years, and formally commissioned as such by the President of the United States under Section 28 of the Act of April 26, 1906 (34 Stat. 137). There is also a Creek Tribal Council composed of duly elected representatives of each of the 44 tribal towns in the Creek Nation. The Yuchi town is represented in this Council by Legus Brown and Willie Tiger. The Yuchis participate in the election of the principal chief of the Creek Nation, who represents the Yuchis as well as all the other constituent parts of the Creek Nation.

11. By action of the Creek Tribal Council the present attorney of record for the Creek Nation in Docket 21 was selected to represent the Creek Nation before the Indians Claims Commission, and by appropriate resolution dated August 29, 1946, approved said contract with said Paul M. Niebell for this purpose. This resolution was approved by the principal chief of the Creek Nation, who was also one of the representatives of the Creek Nation signing the contract on behalf of the Creek Nation. This contract dated August 28, 1946, was duly approved by the Commissioner of Indian Affairs on November 20, 1947, and is now on file with the Indian Claims Commission. The Yuchi Indians, being a constituent part of the Creek Nation, are represented by Docket 21 by the duly authorized attorney for said Creek Nation in said case.

12. The contract with counsel for the Yuchi was approved by the Commissioner of Indian Affairs on June 15, 1951, with the following condition:

> The approval of this contract shall not be construed as a recognition of the Yuchi or Euchee Tribe of Indians of Oklahoma as an identifiable group of Ameri-

can Indians for the purposes of the Indian Claims Commission Act.

13. There is no substantial proof in the record to show that the Yuchis were the aboriginal owners of, or had any exclusive rights in, any of the land ceded to the United States by the Creek Nation by the Treaty of August 9, 1814, which is involved in this suit.

The proof shows that all of this land was solemnly guaranteed by the United States to the Creek Nation as a whole by the Treaties of August 7, 1790, and June 29, 1796. Said lands were owned, occupied and controlled by the Creek Nation.

14. The Fort Jackson Treaty of August 9, 1814 (7 Stat. 120) cedes as territory belonging to the Creek Nation described as follows:

> Beginning at a point on the eastern bank of the Coosa river, where the south boundary line of the Cherokee nation crosses the same; running from thence down the said Coosa river with its eastern bank according to its various meanders to a point one mile above the mouth of Cedar creek, at Fort Williams, thence east two miles, thence south two miles, thence west to the eastern bank of the said Coosa river, thence down the eastern bank thereof according to its various meanders to a point opposite the upper end of the great falls, (called by the natives Woetumka,) thence east from a true meridian line to a point due north of the mouth of Ofucshee, thence south by a like meridian line to the mouth of Ofucshee on the south side of the Tallapoosa river, thence up the same, according to its various meanders, to a point where a direct course will cross the same at the distance of ten miles from the mouth thereof, thence a direct line to the mouth of Summochico creek, which empties into the Chatahouchie river on the east side thereof below the Eufaulau town, thence east from a true meridian line to a point which shall intersect the line now dividing the lands claimed by the said Creek nation from those claimed and owned by the state of Georgia: Provided, nevertheless, that where

any possession of any chief or warrior of the Creek nation, who shall have been friendly to the United States during the war, and taken an active part therein, shall be within the territory ceded by these articles to the United States, every such person shall be entitled to a reservation of land within the said territory of one mile square, to include his improvements as near the centre thereof as may be, which shall inure to the said chief or warrior, and his descendants, so long as he or they shall continue to occupy the same, who shall be protected by and subject to the laws of the United States; but upon the voluntary abandonment thereof, by such possessor or his descendants, the right of occupancy or possession of said lands shall devolve to the United States, and be identified with the right of property ceded hereby. (This is Area 75 in Royce).

15. The territories for which claimants assert compensation in this case are described in Par. 13 of Claimants' Petition as follows:

13. The lands taken from the predecessors of claimants by the Treaty of August 9, 1814, is described as follows, to-wit:

Commencing at a point on the Atlantic coast in the State of Georgia due East from the most southerly part of the Jackson line thence West across the States of Georgia and Alabama to the Tombigby River; thence down that River to the old line of the Spanish domain; thence East, South and East along that line to the Atlantic Ocean thence Northerly up the coast to the place of beginning, containing more than 11,200,000 acres.

EDGAR E. WITT
Chief Commissioner

LOUIS J. O'MARR
Associate Commissioner

WM. M. HOLT
Associate Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION, *Plaintiff*

v.

THE UNITED STATES OF AMERICA, *Defendant.*

Docket No. 21

Dec 29 1955

ADDITIONAL FINDINGS OF FACT

The Commission having heretofore granted a rehearing in this cause, makes the following additional findings of fact:

No. 58(a). By the so-called Jackson treaty of August 9, 1814, 7 Stat. 120, to which the Creek Nation objected and made formal protest, there was ceded under protest and duress to defendant 8,986,653 acres of land possessed and exclusively occupied by the Lower or Friendly Creek Indians, which land was located in what are now the states of Georgia and Alabama with the following boundaries:

> Beginning at a point in Alabama on the 31st parallel where the township line between townships 23 and 24 East of St. Stephens Meridian (Royce's Alabama Plat 1 and Cl. Ex. 4) intersects said meridian, thence north along said township line to a point where it intersects the treaty line which extends northwesterly from the mouth of Summochico Creek in Georgia, thence southeasterly from such intersection along such treaty line to the mouth of Summochico Creek, thence east in Georgia on a line to a point where it intersects the west boundary line of the Creek cession of June 16, 1802, 7 Stat. 68, thence southerly along said west boundary line to a point where it intersects the south boundary line of Georgia, thence west along such boundary line to the Chattahoochie river, thence up said river to where it intersects the southern boundary of Alabama, thence

west along the southern boundary of Alabama to the point of beginning.

(b) That no compensation for said lands was paid by defendant to the Creek Nation or the Lower Creeks and the plaintiff herein is entitled to recover from defendant the value of such 8,986,653 acres of land as of August 9, 1814, for the benefit of the descendants of the Creek Nation, including the intervenors, as it was constituted on August 9, 1814.

Dated at Washington, D. C., this 29th day of December, 1955.

EDGAR E. WITT
Chief Commissioner
LOUIS J. O'MARR
Associate Commissioner
WM. M. HOLT
Associate Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Defendant.*

Docket No. 21

Decided: Dec 29 1955

Appearances:

Paul M. Niebell, Attorney for Petitioner.

C. Lenoir Thompson, with whom were Claude Pepper and Charles Bragman, Attorneys for Intervenor, The Creek Nation East,

Ralph A. Barney, with whom was Mr. Assistant Attorney General, Perry M. Morton, Attorneys for Defendant.

OPINION OF THE COMMISSION

Witt, Chief Commissioner delivered this opinion of the Commission:

LOCATION OF LOWER CREEKS

It is generally agreed that the Friendly or Lower Creeks occupied the lower or southern part of the Creek domain in Georgia and Alabama at the time of the Jackson treaty of August 9, 1814, which was guaranteed the Creek Nation by the Treaty of August 7, 1790, 7 Stat. 35. (Find. 2). Colonel Benjamin Hawkins, one of the first agents appointed to the Creek Nation, recognized the division between the two groups of that Nation and located them as follows: "By the expression 'Lower Creeks' is meant those on the waters of Flint and Chattahoochie; and 'Upper Creeks,' those on the waters of Tallapoosa, Coosa and Alabama." (American State Papers, 2 Indian Affairs 848). This general location of the Lower Creeks conforms to that recognized by the Creeks in their Memorial to Congress in 1853 (Cl. Ex. 32, pp. 1-8) and that of the Indian Bureau. (Cl. Ex. 32, pp. 9-14). Thus, while the principal towns of the Lower Creeks, such as Coweta, Cussetta, etc., were considerably north of the treaty line in Georgia, it is plain lands south of that line were also those of the Lower Creeks.

AREA OF LOWER CREEK LANDS

Having determined that the Lower or Friendly Creeks occupied the lower or southern part of the Creek domain in Georgia and Alabama, it is necessary to fix the boundaries and acreage thereof. As to more definite location of these lands it is stated in the letter of the Commissioner of Indian Affairs, dated January 17, 1853 (Claimant's Ex. 32, p. 11) that all the ceded lands in Georgia

and a portion of those in the southeastern part of Alabama "belonged exclusively to the lower or friendly Creeks * * *."

The Jackson treaty definitely fixed the Lower Creek boundaries of the ceded area in Georgia, for the Creeks ceded by that treaty all their lands in the state lying south of a line starting at a point on the Chatahouchie (Chatahoochee) river where the Summochico Creek empties into the Chatahouchie, "thence east from a true meridian line to a point which shall intersect the line now dividing the lands claimed and owned by the state of Georgia." The eastern terminus of this line is no doubt the point where it intersects the west boundary of the Creek cession of June 16, 1802, 7 Stat. 68. (Royce, southern tract 44 of Georgia). So the part of the 1814 cession in Georgia extends between the treaty line on the north to the southern boundary of the state and between the Chatahoochee river on the west and the west line of the 1802 cession on the east.

The acreage of this area was estimated by the General Land Office in 1854 to be 7,612,800 acres. (See letter of Commissioner of G.L.O. dated April 18, 1854. Part of Cl. Ex. 36). This figure is accepted since it was an estimate made by the agency best qualified to determine it.

As to the area of the Lower or Friendly Creek lands extending into southeast Alabama, determined by the Commissioner of Indian Affairs to be theirs, the Commissioner of the General Land Office, on March 30, 1854, determined that the part in Alabama comprised 1,373,853 acres. (See Cl. Ex. 36 (c) and the map, Cl. Ex. 4, which apparently is the one referred to in Ex. 36 (c), a letter dated March 30, 1854). Adding this acreage to the 7,612,800 acres in Georgia, the total acreage of the Lower Creek lands is 8,986,653 acres. It will be seen by referring to the map, Ex. 4, that the Alabama part lies south of the northerly treaty line and extends south to the

southern boundary of Alabama and west from the Chattahoochee river to the line shown on the map, Ex. 4, which is the township line between 23 and 24 East.

The total acreage of 8,986,653 is confused by the fac. the Commissioner of Indian Affairs, Lea, in his two letters of January 17 and 21, 1853 (part of Cl. Ex. 32) uses the figure 8,849,940, and Commissioner Manypenny in his letter to the Secretary of the Interior on August 1, 1854, Cl. Ex. 40, mentions the difference between the Indian Bureau's figure and that of the General Land Office. In discussing this difference and the method of determining the western boundary of the Lower Creek lands he said:

> It has been a delicate duty to attempt to fix a line which does not appear to have been formally and specifically laid down. But upon the authority of the reports to the War Department, before, during and after the war, it appears that the "Friendly Creeks" were mainly those known as the Lower Creeks who resided on the waters of the Flint and Chattahoochee rivers, with a few of the Upper Creek towns residing on the Tallapoosa; and that the "Red Sticks" or those who became hostile were exclusively Upper Creeks and resided on the waters of the Tallapoosa, Coosa and Alabama. Taking this data in connection with the memorial of the Creek nation of Indians which accompanied the letter from Mr. Sebastian—as the claims therein named refers to the locality of the friendly Indians—and supported in some measure by the report of Col. Benjamin Hawkins, in August 1815, who stated the line of the capitulation included "nearly eight millions of acres" that belonged to the "friendly Indians, over and above all the hunting grounds of the friendly Upper Creeks"—as a basis, it has appeared to be a just assumption that the true point of separation between the parties would be the highlands which separate the respective waters on which they resided. Therefore, following the northern line of the territory acquired to the point where the waters of the Upper are separated from those of the Lower Creeks, to fix an initial, it has appeared necessary to draw an arbitrary line due south to the

> Southern boundary of the ceded territory as the nearest approximation to the true boundary of the respective parties that can now be arrived at. Upon this basis the number of acres of land lying east of the line and belonging to the friendly Creeks, would be according to the estimates of this office 8,849,940, and according to that of the Commissioner of the General Land Office as shown by his letter referred to and one written on the 30th to 8,986,653 acren.

It appears, therefore, that we must decide between the Bureau's figure and that computed by the General Land Office. As will be seen by reference to the letters from the General Land Office of February 3, 14, March 30, and April 18, all in 1854, (Cl. Exs. 36 (a), (b), (c), (d)) the G. L. O. was requested to compute the acreage of the Lower Creeks within the boundaries fixed by the Indian Bureau. This apparently was not done until 1854, (see Cl. Ex. 36 (c)), so prior to that time and at the time of Commissioner Lea's 1853 letters, (Ex. 32) the estimate of acreage was made by the Indian Bureau. The fact that the matter of acreage was referred to the G. L. O. indicates that the Indian Bureau was not sure of its estimate and asked the G. L. O. to make the computation. We believe the latter agency was better equipped and qualified to determine the acreage and that its determination of 8,986,653 acres must be accepted as the most reliable figure for the Lower Creek area based upon the evidence now before the Commission.

EDGAR E. WITT
Chief Commissioner

Approved:

LOUIS J. O'MARR
Associate Commissioner

WM. M. HOLT
Associate Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION, *Plaintiff*

v.

THE UNITED STATES OF AMERICA, *Defendant.*

Docket No. 21

INTERLOCUTORY ORDER

Upon the additional findings of fact, this day filed herein, the Commission concludes as a matter of law that of the lands guaranteed the Creek Nation by the treaty of August 7, 1790, 7 Stat. 35, the Creeks by the Jackson treaty of August 9, 1814, ceded to defendant the 8,986,653 acres of land possessed and exclusively occupied by the Lower or Friendly Creeks, which land is located within the boundaries set forth in Finding 58(a) and that the plaintiff, the Creek Nation, is entitled to recover the value of said 8,986,653 acres as of August 9, 1814.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, That the plaintiff recover of defendant the value of said 8,986,653 acres of land as of August 9, 1814, less such offsets against the plaintiff as may be authorized by the Indian Claims Commission Act; that such recovery shall be for the benefit of all descendants of the Creek Nation as it was constituted on August 9, 1814, which shall include the intervenors herein.

IT IS FURTHER ORDERED, That a hearing shall be had on the value of said lands and at the same time there shall be had a hearing on the offsets, counterclaims, or other demands, if any, which may be claimed by defendant; that defendant shall within sixty days from the date of this order, amend its answer by setting forth all offsets, counterclaims, or other demands permitted by the Indian Claims Commission Act, it may have against plaintiff.

Dated at Washington, D. C., this 29th of December, 1955.

EDGAR E. WITT
Chief Commissioner

LOUIS J. O'MARR
Associate Commissioner

WM. M. HOLT
Associate Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION, *Plaintiff*

v.

THE UNITED STATES OF AMERICA, *Defendant.*

Docket No. 21

ORDER GRANTING REHEARING

Came on to be heard by the Commission on December 9, 1955, the motion of the intervenor filed on July 15, 1955, for a rehearing herein, and the defendant's opposition to such motion filed on October 26, 1955, and after oral argument, the motion and objections thereto were submitted to the Commission and taken under advisement.

And the Commission now being fully advised in the premises concludes that said motion should be granted and that the intercolutory orders of April 22, 1952, and May 5, 1955, should be set aside and the finding No. 42 filed herein on April 22, 1952, stricken. All other findings not heretofore changed to remain.

IT IS THEREFORE ORDERED AND ADJUDGED, That a rehearing on the evidence heretofore offered herein is hereby granted and that the interlocutory orders of April 22, 1952, and May 5, 1955, be, and the same are,

hereby set aside and that Finding No. 42 of the findings of fact filed herein on April 22, 1952, is hereby stricken.

Dated at Washington, D. C., this 29th day of December, 1955.

EDGAR E. WITT
Chief Commissioner

LOUIS J. O'MARR
Associate Commissioner

WM. M. HOLT
Associate Commissioner

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IN THE SUPREME COURT OF THE UNITED STATES,
October Term, 1956

No. 648

THE YUCHI (EUCHEE) TRIBE OF INDIANS, and S. W. BROWN, LEGUS BROWN, WILLIE TIGER, FRED SKEETER and JESSE JAMES, members of said Tribe, Band or Group of Indians, for themselves and all other members of said Tribe, Band or Group of Indians,
Petitioners,
vs.
THE UNITED STATES OF AMERICA, *Respondent,*

Consolidated below with Docket No. 21:
THE CREEK NATION OF OKLAHOMA, *Respondent,*
vs.
THE UNITED STATES OF AMERICA, *Respondent,*

Interpleader in Docket No. 21,
CREEK NATION EAST, *Respondent.*

REPLY TO THE ANSWER BRIEF OF RESPONDENT, THE UNITED STATES.

Foreword[1]

To the Honorable The Supreme Court of the United States of America:

Question Presented by Respondent.

The issues to be considered herein at this time, as petitioners understand, are: Do the questions presented by

1. Emphases herein, unless otherwise stated, are those supplied by Petitioners.

them and the existence of provable error justify the issuance of the Writ?

Petitioners respectfully state that this Honorable Court, as a matter of sound judicial discretion, does have jurisdiction to review the conclusions of law made by the tribunals below.

Jurisdiction.

Jurisdiction is given the Commission to hear and determine group Indian Claim suits, provided in the Indian Claims Act,[2] by Section 2 (R. Br. 2). Jurisdiction to bring group Indian Claim suits, provided in the Act, in a representative capacity, is given in Section 10 (R. Br. 2, 3) of the Act.

STATEMENT.

At page 3 of respondent's brief appears the following:

> "In January 1948, the Creek Nation of Oklahoma, *on behalf of the descendants of the Creek Nation of 1814 now residing in Oklahoma,* filed a petition (Docket No. 21, Ind. Cl. Comm.)"

At page 2, paragraph 3 of the above mentioned petition (R. orig. papers) appears the following:

> "That before its removal to what is now the State of Oklahoma, the petitioner was the owner of a large national domain embracing within its limits almost all of what are now the States of Alabama and Georgia, and a large portion of the present State of Mississippi, the boundaries of which domain were definitely defined in treaties between petitioner and the United States. That lands forming a part of said national domain constitute the subject matter of this proceeding."

2. 60 Stat. 1049, 25 U. S. C. 70.

The Creek Nation of Oklahoma is an amalgamation of 44 Indian tribes and many persons of African descent. It was created as an entity under the provisions of the Treaty of June 14, 1866.[3] Its petition discloses that (a) it is not the real party in interest, and (b) that no jurisdictional grounds are alleged to bring a suit in a representative capacity.

At page 6 of respondent's brief there appears the following reference to the Creek Nation of Oklahoma:

> "• • •, the tribal Government being still in existence, in modified form (Fdgs. 8-11, App. *infra*, pp. 13-14).

Act of April 26, Secs. 28 and 29,[4] S. App., pp. 31, 32, disproves the existence of any governmental powers in such Nation for more than fifty years. The status of its members, citizens of the United States, is similar to that which they hold in their churches or lodges.

ARGUMENT.

1. In the opinion sought to be reviewed, the United States Court of Claims has decided a Federal question in a way in conflict with the applicable decisions of this Court.

Respondent argues, page 7, the First Question Presented by Petitioners, as follows:

> "• • • Petitioners' present claim to title as having been acquired by treaty with the United States (Pet. 8) is, as the court below noted (Pet. App. 33-35), shown to be fallacious merely by looking to the language of the treaties. And, as the court further found (Pet App.

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3. S. App., pp. 28, 29; 14 Stat. 785.

4. S. App., pp. 31-32; 34 Stat. 137.

35-36), petitioners' claim of exclusive possession even if supported, would not establish title to the land in question. Moreover, contrary to petitioners' contention (Pet. 9-10), there is no conflict between the decision below and prior decisions of this court. * * *"

In the opinion asked to be reviewed, App. 33, appears the following:

"* * * The fallacy of this argument (that of petitioners) is shown merely by looking to the language of the treaties of 1790 and 1796, and we cannot, therefore, agree with the Yuchi's contention. * * *"

Treaty of August 7, 1790:[5]

"A treaty of Peace and Friendship made and concluded between the President of the United States of America on the Part and Behalf of the said States, and the undersigned Kings, Chiefs and Warriors of the Creek Nation of Indians, on the Part and Behalf of the said Nation.

"The parties being desirous of establishing permanent peace and friendship between the United States and the said Creek Nation, and the citizens and members thereof, and to remove the causes of war by ascertaining their limits, and making other necessary, just and friendly arrangements; The President of the United States, by Henry Knox, Secretary for the Department of War, whom he hath constituted with full powers for these purposes, by and with the advice and consent of the Senate of the United States, and the Creek Nation, by the undersigned Kings, Chiefs and Warriors, representing the said nation have agreed to the following articles:

Article I.

"There shall be perpetual peace and friendship between all the citizens of United States of America, and

5. S. App., pp. 1-8; 7 Stat. 35.

all the individuals, towns and *tribes of* the Upper, Middle and Lower Creeks and Seminoles comprising the Creek Nation of Indians."

Article II.

"The undersigned Kings, Chiefs and Warriors, for themselves and all parts of the Creek Nation within the limits of the United States, *do acknowledge themselves, and the said parts of the Creek nation, to be under the protection of the United States of America, and of no other sovereign whomsoever, and they also stipulate that the said Creek Nation will not hold any treaty with an individual State, or with individuals of any State.*"

Article V.

"The United States solemnly guarantees to the Creek Nation, all *their lands within the limits of the United States* to the westward and southward of the boundary described in the preceding article."

In Article XIV appears the following:

"* * * and the *whole* Creek nation * * *"

Just above the signature of the Indians to the treaty appears:

"In behalf of themselves and the *whole* Creek Nation of Indians."

The United States had a title of Discovery to the lands of Interest. The individual Indians are recognized to have had a communal interest of use and occupancy to the lands used and occupied by the entity who held sovereignty over him whether that be his tribe or a national entity. The United States had plenary power[6] to take this right in any manner it chose.

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6. United States v. Creek Nation, 295 U. S. 105, 107; United States v. Sandoval, 231 U. S. 28.

Whether the United States, as their guardian, solemnly guaranteed this right of use and occupancy to each tribe in the lands it used and occupied or to a group of affiliated tribes called a Creek Nation is a matter of prime importance herein. Petitioners urge that the Commission never acquired jurisdiction of Docket No. 21. If this is found to be correct this litigation is in truth between petitioners and the United States.

Who were the contracting parties to the treaties of 1790[7] and 1796[8] and to whom the solemn guarantee of the use and occupancy of the lands were made are purely legal questions depending on the interpretation of the above treaties under Federal treaties, statutes and decisions as questions of law.

The title and preamble of the treaty of 1790 indicate that the purpose of the treaty is peace and friendship.

In Article II it is acknowledged that kings, chiefs and warriors, including all parts of the Creek Nation, are under the protection of the United States. It is further stipulated that they would only make treaties with the United States. In this way the United States is recognized as their guardian; it is also stipulated that they would not cede their right to use and occupancy of lands to anyone but the United States.

Article V provides, "That the United States solemnly guarantee to the Creek Nation all *their* lands within the United States * * *." The use of the word "their" rather than the word "its" indicates that the United States recognized it was dealing with a group of tribes rather than a single entity. Thus it appears that the United States in-

7. S. App. 1-8; 7 Stat. 35.

8. S. App. 8-17; 7 Stat. 56.

tended by the "solemn guarantee" to grant a restricted fee title. While protection and solemn guarantee are not the technical words used by Whites to indicate grant, the same meaning is certainly intended.

The Treaty was signed by certain kings, chiefs and warriors "on behalf of themselves and the *whole* Creek Nation of Indians." The signatures of the Indians appear under the headings of the respective tribes, which indicated their official position in the tribe. If there had been a governmental head and a National Council the United States would have insisted that such officials execute the treaty. Therefore, we obviously reason that there were no such officials. Tribes referred to in Article I carry the concept of use and occupancy of a definite area by individual tribes. Prior to the Treaty of 1790, use and occupancy was the sole interest these Indians had in lands of interest herein.

The Treaty was made to promote peace and friendship between the United States and the tribes. It would not be conducive to the establishment and preservation of peace and friendship to grant a communal interest in all the lands to all the tribes. This is true because they would have established their own home, own gardening spots, surrounded by their families.

Ambiguities.

The words "Creek Nation of Indians" as used in the treaty, is a phrase of general meaning. The meaning intended in each instance must be found by reference to the context of the document, where used, or other reference. The phrase at the time of interest was used to refer to the geographical location of the tribes of interest, a loose war confederacy or as a compliment to a group of assembled Indians.

As used in the Treaty of 1790 the words "Creek Nation" were not intended to recognize the group of interest as a single entity with a governing head and other officials. This is established by the title to the Treaty, the preamble, Articles I, II, III, XVI and the signatures when interpreted under Treaties, Statutes and applicable opinions of this Court.

Before the Treaty of 1790 was executed the United States owned the lands of interest by a Title of Discovery.[9] The United States recognized a right of use and occupancy by Indian tribes until that right was extinguished. Tribe is defined in *Montoya* v. *United States,*[10] as follows:

> "• • • We are more concerned in this case with the meaning of the words, 'tribes and bands.' By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government and inhabiting a particular, though sometimes ill-defined territory, • • •."

The title and preamble recite that the purpose of the treaty is peace and friendship between the parties.

Article I recites "that there shall be perpetual peace and friendship between all the citizens of the United States and all the *individuals, towns and tribes of the Upper, Middle and Lower Creeks,* comprising the Creek Nation of Indians." This standing alone recognizes the tribes as the governing bodies.

Article II provides, "The Undersigned, kings, chiefs and warriors for themselves *and all parts of the Creek Nation within the limits of the United States* do acknowledge themselves and the said parts of the Creek Nation to

9. Worcester v. Georgia, 31 U. S. ....., 6 Peters 515.

10. Montoya v. United States, 180 U. S. 261.

be under the protection of the United States * * *." The Article further provides that the parties would not enter into any treaty except with the United States. This Article recognized the tribes were under the protection of the United States and they would treat or deal with no one else.

The use of the word "tribe" in Article II is of importance. The United States owned the lands by a title of discovery. Indian tribes were recognized to have a right of use and occupancy, until extinguished by voluntary abandonment, use in common with another tribe or tribes, or conquest. (*Worcester* v. *Georgia, supra.*) The United States had plenary power to take lands from Indian tribes, however held, in any manner it chose. (*United States* v. *Creek Nation, supra.*)

Article V recites, "The United States solemnly guarantees to the Creek Nation all their lands within the limits of the United States." That this guarantee gave a restricted fee to the individual tribes when taken in connection with the purposes of the treaty, peace and friendship, protection, and definition of tribe (*Montoya* v. *United States, supra*) must follow. Use of "they" rather than "it" in Article V and that the Indian signatures of the tribes are shown to be officials of tribes, who owned the right of use and occupancy, when construed by the treaty, statutes and decisions of this Court, grant to individual tribes was intended.

The treaty of 1796 in Article I adopts the treaty of 1790, unless otherwise provided therein. What has been stated as to the treaty of 1790 applies where applicable to the treaty of 1796.

Petitioners urge that two treaties, the Law of the Land, be construed to have been with the individual tribes and

that they granted to the Yuchi tribe of their dates a restricted fee title to the lands for the taking of which they seek an award.

2. In the opinion sought to be reviewed, the Court of Claims has so far departed from the accepted and usual course of Judicial proceedings and has so far sanctioned such departure by the Indian Claims Commission as to call for exercise of this Court's power of supervision.

Jurisdiction.

(*a*) Section 2 of the Indian Claims Act reads in part, as follows:

> "Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska * * *"

Section 10 reads in part as follows:

> "* * * But wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band or group, such organization shall be accorded the exclusive privilege of representing such Indians unless fraud, collusion or laches on the part of such organization be shown to the satisfaction of the Commission."

The following jurisdictional provisions are found in the Petition (R. Orig. papers) (page 1):

> "That by a certain Act of Congress, approved August 13, 1946 (60 Stat. 959; 25 U. S. C. 70), the petitioner was authorized and empowered to bring this suit * * *"

Page 3, paragraph 3:

> "That before its removal to what is now the State of Oklahoma, the Petitioner was the owner of a large

National domain embracing within its limits almost all of what is now the States of Alabama, Georgia and a large portion of the present State of Mississippi, the boundaries of which domain were definitely defined in treaties between the petitioner and the United States. That lands forming a part of said national domain constitute the subject matter of this proceeding."

Page 13, paragraph 23:

"* * * that petitioner is justly entitled to recover of and from the United States the value of said lands on the basis of fair and honorable dealing between a guardian and its Indian ward."

From the above excerpts it appears, (*1*) that no jurisdictional facts are plead to bring a suit in a representative capacity. No suit of that nature was brought and (*2*) that the Creek Nation is not the real party in interest. Petitioners urge that the accepted and usual procedure would have been to dismiss Docket No. 21; that such jurisdictional questions cannot, after limitation be cured, waived or admitted.

The Creek Nation East interplead to participate (R. Orig. papers) in any award made to the Creek Nation of Oklahoma. If the first failed on jurisdictional ground the latter also failed.

(*b*) The Petitioners sued for just compensation. The Creek Nation of Oklahoma sued for value at the time of the taking. If the Commission as urged, by Petitioners, had no jurisdiction over Docket No. 21, the usual and accepted course of judicial procedure would be to dismiss the suit for lack of jurisdiction rather than to consolidate it with a suit of an entirely different character.

(*c*) As disclosed by its pleadings (a), *supra*, the suit by the Creek Nation of Oklahoma was for that entity. The

opinion sought to be reviewed affirms the holding of the Commission that an award be distributed to the descendants of the members of a Creek Nation as it was constituted in 1814. This is not within the scope of the pleadings in Docket No. 21. The determination of an identifiable group is a jurisdictional question for the Commission to determine. The determination of the identity of a group granted an award is a political question for Congress to determine.

(*d*) The Petitioners sued for just compensation. The Creek Nation sued for value at the time taken. In this manner the Creek Nation seeks to dilute an award, if any, about seven-eighths. The proposed award is for the lands of the Lower Creeks. The proposed distribution of the award is to all the living descendants of the members of the so-called Creek Nation as it was constituted in 1814. As diluted, the share of an individual recipient is diluted to almost the vanishing point. This makes a great conflict of interest between parties herein.

It is Hornbook law that one organization and one lawyer cannot represent conflicting interest, and that an attempt to do so involves at least constructive fraud.

CONCLUSION.

For the reasons set forth above Petitioners submit that their Petition for a Writ of Certiorari should be granted.

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Office - Supreme Court, U.S.
FILED
FEB 8 1957
JOHN T. FEY, Clerk

No. 648

In the Supreme Court of the United States

October Term, 1956.

THE YUCHI (EUCHEE) TRIBE OF INDIANS, and S. W. BROWN, LEGUS BROWN, WILLIE TIGER, FRED SKEETER and JESSE JAMES, members of said Tribe, Band or Group of Indians, for themselves and all other members of said Tribe, Band or Group of Indians,
Petitioners,
vs.
THE UNITED STATES OF AMERICA, *Respondent,*

Consolidated below with Docket No. 21:

THE CREEK NATION OF OKLAHOMA, *Respondent,*
vs.
THE UNITED STATES OF AMERICA, *Respondent,*

Interpleader in Docket No. 21,
CREEK NATION EAST, *Respondent.*

REPLY OF PETITIONERS TO THE ANSWER OF THE CREEK NATION OF OKLAHOMA AND THE CREEK NATION EAST.

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IN THE SUPREME COURT OF THE UNITED STATES.
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THE YUCHI (EUCHEE) TRIBE OF INDIANS, and S. W. BROWN, LEGUS BROWN, WILLIE TIGER, FRED SKEETER and JESSE JAMES, members of said Tribe, Band or Group of Indians, for themselves and all other members of said Tribe, Band or Group of Indians,
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CREEK NATION EAST, *Respondent.*

REPLY OF PETITIONERS TO THE ANSWER OF THE CREEK NATION OF OKLAHOMA AND THE CREEK NATION EAST.

Foreword.[1]

To the Honorable Supreme Court of the United States of America:

Issues:

The issues to be considered herein at this time as Petitioners understand, are: *Do the questions presented by*

1. Emphases herein, unless otherwise stated, are those supplied by Petitioners.

Petitioners and the existence of probable error justify the issuance of a writ?

Statement.

Jurisdiction:

Jurisdiction is given the Commission to hear and determine group Indian Claim suits, provided in the Indian Claims Act[2] by Section 2. Jurisdiction to bring group Indian Claim suits in a representaive capacity is provided in Section 10 of the Act.

Petitioners urge that the Commission did not have jurisdiction to hear and determine the claim of either the Creek Nation of Oklahoma or the Creek Nation East for the following reasons:

a. The petition (R. Orig. papers) of the Creek Nation of Oklahoma, which was a dependent government, composed of Indian tribes and persons of African descent, organized under the provisions of the treaty of June 14, 1866[3], at pages 1, 2 and 13, discloses that:

1. It is not the real party in interest.
2. Required jurisdictional allegation to bring suit in a representaive capacity is not alleged. The suit is not of that character.

b. The Amended Application to intervene and the Amended Petition (R. Orig. papers) of the Creek Nation East disclose that it only seeks to participate in any award recovered by the Creek Nation of Oklahoma.

1. When the jurisdiction of the latter fails, the former also fails.
2. The Creek Nation East has offered no proper proof that it is an identifiable group of American Indians.

---

2. 60 Stat. 1049; 21 U. S. C. 70.
3. 14 Stat. 785; S. App. 28-29.

In respondent's brief, page 3, appears the following:

"* * * On December 21, 1953, an order was entered by the Commission allowing intervention of the Creek Nation East, on the basis of evidence before the Commission in the form of affidavits showing that members of the Creek Nation East were descendants of the Creek Nation of 1814 and therefore were an identifiable group of American Indians. * * *"

Questions of Law.

The United States held a Title of Discovery to the lands of interest. The Indian tribes were recognized to have a communal right of use and occupancy to the lands they used and occupied.[4] This right was held in trust by the organized entity to which the communal owners belonged, be that a tribe or an organized group of tribes with a leader and other officials. Respondents do not dispute that the ancestors of petitioners, prior to the Treaties of 1790[5] and 1796[6] owned a communal interest in the right of use and occupancy to the lands for which they ask an award. Respondents urge that prior to the treaties of 1790 and 1796 use and occupancy of all the lands used and occupied by 47 tribes was vested in an entity called the Creek Nation, in trust, for all its members, including the members of the Yuchi tribe. The United States had plenary[7] power to take that right of use and occupancy in any manner it chose. The ownership of the claims growing out of the tortious taking of the lands by the United States by the treaty of August 9, 1814, is an important question herein.

4. Johnson v. McIntosh, 8 Wheaton 543 (1823); Worcester v. Georgia, 6 Peters 515 (1832).

5. 7 Stat. 35.

6. 7 Stat. 56.

7. United States v. Creek Nation, 295 U. S. 105, 107.

ARGUMENT.

I.

Respondents first conclude that a writ will not be granted because the legal questions raised by petitioners are inseparable from the Findings of Fact of the Court of Claims.

Section 20 (c) of the Indian Claims Act, *supra*, provides:

> "(c) Determination of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court * * *."

Petitioners have examined the cases cited by respondents on this question and do not think any of them are applicable herein.

The Treaties.

Who were the contracting Indian parties to the treaties of 1790[8] and 1796[9] and to whom protection and the solemn guarantee was given are questions of law to be determined under Federal Statutes, treaties and opinions. It is permissible to resort to other evidence if the meaning intended by the parties cannot be determined by the context of the treaty. Words and phrases of general meaning are found and words and phrases are used to convey a different meaning. In each instance the meaning intended must be found in the context; if not found it is permissible to resort to other evidence. Herein respondents use the words "Creek Nation" with reference to the Creek Nation of Oklahoma and also to refer to the 47 tribes of 1814. In *Cherokee Nation* v. *Georgia*,[10] Chief Justice MARSHALL discusses the different

8. S. App. 1-8; 7 Stat. 35.

9. S. App. 8-17; 7 Stat. 56.

10. Cherokee Nation v. Georgia, 5 Peters (30 U. S.) 1-48, 8 L. ed. 25-42 (1831).

meanings conveyed by the words "Foreign Nation" in different parts of the Constitution.

It has appeared[11] that prior to the adoption of the treaty of 1790 the United States owned the lands of interest by a Title of Discovery but recognized a right of use and occupancy in the Indians. It appears from the definition of tribe in *Montoya* v. *United States*:[12]

> "We are more concerned in this case with the meaning of the words 'tribe' and 'band.' By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory * * *."

That this right prior to the treaty of 1790 was in the individual tribe, that used and occupied a separate territory. After the adoption of the treaty of 1790 rights in the land were fixed by that treaty because the United States had plenary power[13] to dispose of it in any way it chose. Petitioners claim the lands it used and occupied were granted to the Yuchi tribe in trust for its communal members. Respondents claim that the lands of 47 tribes were granted to a Creek Nation to be held in trust for all the communal owners of the 47 tribes, including the Yuchi tribe.

The purposes of the treaty as clearly stated in the title, preamble and Article I are to remove the cause of war and provide perpetual peace between the United States and all the individuals, towns and *tribes* of the Upper, Middle and Lower Creeks and Seminoles, composing the Creek Nation of Indians.

The use of the word "tribe" recognized that each tribe was the owner of the right to use and occupy separate lands.

---

11. Worcester v. Georgia, 6 Peters (30 U. S.) 580, 8 L. ed. 508 (1831).
12. Montoya v. United States, 180 U. S. 261.
13. United States v. Creek Nation, 295 U. S. 105.

(Definition of tribe, excerpt from *Montoya* v. *United States supra.*)

Article II.

"The undersigned Kings, Chiefs and Warriors, for themselves and all parts of the Creek Nation within the limits of the United States, do acknowledge themselves, and all parts of the Creek Nation, to be under the protection of the United States of America, and of no other sovereign whomsoever, and they also stipulate that the said Creek Nation will not hold any treaty with an individual State, or with individuals of any State."

In Article II the Kings, Chiefs and Warriors in effect accept the United States as their guardian, agree to treaty with no one else and that they will only cede their lands to the United States.

Article V.

"The United States solemnly guarantees to the Creek Nation all *their lands within the limits of the United States* to the westward and southward of the boundary described in the preceding Article."

Article VI, VII, IX provide for the exclusive and protected use of the lands by the Indians. In Article XII, the United States promises to aid the Indians to become herdsmen and cultivators. It promises from time to time to gratuitously furnish domestic animals and implements of husbandry, and to send so many persons as they may judge proper, not exceeding four in number, to reside with and assist them.

Article XIII provides, "All animosities for past grievances shall cease * * *." In Article XIV the words "whole Creek Nation" are used. Just above the signatures of the

Indians is, "In behalf of themselves and whole Creek Nation of Indians."

The treaty was made to remove the causes of war and to provide perpetual peace and friendship between Indian tribes and the United States. It was signed by the Kings, Chiefs and Warriors of tribes, their official position in their tribe being designed in the signatures. If there had been a Governmental head and a National Council, such officials would have executed the treaties. Petitioners urge that there were no such officials. Tribes referred to in Article I carry the concept of use and occupancy of a definite territory by the tribe. Prior to the Treaty of 1790, use and occupancy was the sole interest these Indians had in the lands of interest.

The treaty was made to remove the causes of war and to promote friendship between the United States and the tribes. It would not be conducive to removing causes for war, and peace and friendship, to grant a communal interest in all the lands to all the tribes. This is true because they would have established their own home, own gardening spots, surrounded by their families and relatives.

The Treaty of 1796 follows the same pattern as the Treaty of 1790 and what has been said as the Treaty of 1790 applies to the Treaty of 1796.

Article I reads as follows:

> "The Treaty entered into, at New York, between the parties on the 7th day of August, 1790, is, and shall remain obligatory on the contracting parties, according to the terms of it, except as herein provided for."

Petitioners urge that the Opinion of the Solicitor of the Department of the Interior, is a legal opinion[14] by an im-

14. Memo. Sol. Depart. Int., July 15, 1937.

portant official of the United States Government and it is within the discretion of this Honorable Court to consider it if it so desires.

In *United States* v. *Shoshone Tribe*[15] this Court had under consideration, where by treaty the United States gave a perpetual exclusive right of "use and occupancy" of a large tract of land to the tribe. The question involved was whether timber and minerals were owned by the tribe. In the opinion it is stated:

> "* * * Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or being held otherwise than in common, that right is as sacred and as securely safe-guarded as is fee simple absolute title. *Cherokee Nation* v. *Georgia*, 5 Pet. 1-48, 8 L. ed. 25-42; *Worcester* v. *Georgia, supra* (6 Pet. 580, 8 L. ed. 508). * * *
>
> "* * * the lower court did not err in holding that the right of the Shoshone Tribe included the timber and minerals within the reservation. * * *"

Doubtful Questions.

The doubtful questions in the Treaties of 1790 and 1796 are (a):

> *Who were the contracting parties to the above referenced treaties;*
>
> *To whom was the land granted in trust?*

In *United States* v. *Shoshone Tribe, supra,* syllabi 4 and 5 read:

> 4. "* * * Treaties between the United States and Indian tribes are not to be interpreted narrowly, as sometimes may be writings expressed in words of art

15. United States v. Shoshone Tribe, 304 U. S. 111-118.

employed by words of conveyances, but are to be construed in the sense in which naturally the Indians would understand them.

5. "* * * In interpreting a treaty between the United States and an Indian tribe, any doubt as to the ownership of lands or minerals or timber on lands reserved to the tribe, should be resolved in favor of the Indians. * * *"

Particularly doubtful questions are:

(a) *Were the treaties with individual tribes or with an entity called the Creek Nation?*

(b) *Was the land granted to the individual tribes or to an entity, called the Creek Nation?*

The purpose of the treaties was to remove the causes of war, establish and maintain friendship. The United States owned the lands by a Title of Discovery. It recognized a right to use and occupancy in the entity that used and occupied definite territory. Only a tribe qualified for this ownership. Notwithstanding the plenary power of the United States to do so, to distribute this communal ownership in individual tribes and apply it to 47 tribes would unquestionably be contrary to the purposes of the treaties. The signatures of officials of tribes rather than officials of a Creek Nation indicate the words "Creek Nation" were not used in the sense of an existing entity or centralized nation of affiliated tribes. Article I of the Treaty of 1790 provides that the purposes of the treaty is with the "*individuals, towns and tribes.*" The use of the words "they" rather than the word "it" in Article V of the Treaty of 1790, and "tribe" in Article I, indicates a group of tribes was not intended. What has been said of the Treaty of 1790 applies equally to the Treaty of 1796.

From what has been said above, petitioners urge that the ancestors of Petitioners were granted a restricted fee to the lands for the tortious taking of which they sue for herein.

II.

In the opinion sought to be reviewed, the Court of Claims has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such departure by the Indian Claims Commission as to call for exercise of this Court's power of supervision.

Jurisdiction.

(a) Section 2 of the Indian Claims Act reads in part as follows:

> "Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska * * *."

Section 10 reads in part as follows:

> "* * * But wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band or group, such organization shall be accorded the exclusive privilege of representing such Indians unless fraud, collusion or laches on the part of such organization be shown to the satisfaction of the Commission."

The following jurisdictional facts are alleged in the Petition of the Creek Nation of Oklahoma (R. Orig. papers) (page 1):

> "That by a certain Act of Congress, approved August 13, 1946 (60 Stat. 959; 25 U. S. C. 70), the petitioner was authorized and empowered to bring this suit * * *."

Page 3, paragraph 3:

> "That before its removal to what is now the State of Oklahoma, the Petitioner was the owner of a large National domain embracing within its limits almost all of what is now the States of Alabama, Georgia and a large portion of the present State of Mississippi, the boundaries of which domain were definitely defined in treaties between the petitioner and the United States. That lands forming a part of said national domain constitute the subject matter of this proceeding."

Page 13, paragraph 23:

> "* * * that petitioner is justly entitled to recover of and from the United States the value of said lands on the basis of fair and honorable dealing between a guardian and its Indian ward."

From the above excerpts it appears, (*1*) that no jurisdictional facts are plead to bring a suit in a representative capacity. No suit of that nature was brought and (*2*) that the Creek Nation is not the real party in interest. Petitioners urge that the accepted and usual procedure would have been to dismiss Docket No. 21; that such jurisdictional questions cannot, after limitation, be cured, waived or admitted.

The Creek Nation East interplead to participate (R. Orig. papers) in any award made to the Creek Nation of Oklahoma. If the Creek Nation of Oklahoma failed on jurisdictional ground the Creek Nation East also failed.

The determination (Rs. Br., p. 3) of the jurisdictional question, by the Commission, that the members of the Creek Nation East are an identifiable group of American Indians, on the basis of affidavits by interested parties of matters that occurred 150 years ago, is a departure from the accepted and usual course of judicial procedure.

(b) The Petitioners sued for just compensation. The Creek Nation of Oklahoma sued for value at the time of the taking. If the Commission, as urged by Petitioners, had no jurisdiction over Docket No. 21, the usual and accepted course of judicial procedure would be to dismiss the suit for lack of jurisdiction rather than to consolidate it with a suit of an entirely different character.

(c) As disclosed by its pleadings (a), *supra*, the suit by the Creek Nation of Oklahoma was for that entity. The opinion sought to be reviewed affirms the holding of the Commission that an award be distributed to the descendants of the members of a Creek Nation as it was constituted in 1814. This is not within the scope of the pleadings in Docket No. 21. The determination of an identifiable group is a jurisdictional question for the Commission to determine. The determination of the identity of a group granted an award is a political question for Congress to determine.

(d) The Petitioners sued for just compensation. The Creek Nation sued for value at the time taken. In this manner the Creek Nation seeks to dilute an award, if any, about seven-eighths. The proposed award is for the lands of the Lower Creek tribes. The proposed distribution of the award is to all the living descendants of the members of the so-called Creek Nation as it was constituted in 1814. As diluted, the share of an individual recipient is reduced to almost the vanishing point. This makes a great conflict of interest between parties herein.

It is Hornbook law that one organization and one lawyer cannot represent conflicting interests, and that an attempt to do so involves at least constructive fraud.

Conclusion.

For the reasons set forth above Petitioners submit that their Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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FILED
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JOHN T. FEY, C

No. 648

In the Supreme Court of the United States

October Term, 1956.

THE YUCHI (EUCHEE) TRIBE OF INDIANS, *ET AL.*,
Below Docket No. 172,
Petitioners,
vs.
THE UNITED STATES OF AMERICA, *Respondent,*

Consoldated with

CREEK NATION, Below Docket No. 21, *Respondents,*
vs.
THE UNITED STATES OF AMERICA, *Respondent,*
THE CREEK NATION EAST, Interpeader,
Below in Docket No. 21,
Respondent.

PETITION for REHEARING

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IN THE SUPREME COURT OF THE UNITED STATES.
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THE UNITED STATES OF AMERICA, *Respondent,*
THE CREEK NATION EAST, Interpeader,
Below in Docket No. 21,
Respondent.

PETITION FOR REHEARING.

To the Honorable Supreme Court of the United States of America:

Petitioners respectfully petition this Honorable Court for a rehearing in the above entitled cause for the following reasons:

The Court of Claims in the opinion sought to be reviewed affirmed an order of the Indian Claims Commission dismissing the suit of Petitioners.

Herein, we have a circumstance of substantial substance in the interpretation of the Treaties of August 7, 1790,[1] and

1. 7 Stat. 35; S. App., pp. 1-8.

August 29, 1796.[2] Two identifiable groups sued the United States under the Indian Claims Act[3] for the same lands. The suits, because of conflicting interest were consolidated. Petitioners assert that August 9, 1814, their ancestors owned all the communal interest in the lands for which they seek an award. Respondents, The Creek Nation of Oklahoma and the Creek Nation East assert the lands were communal owned by an affiliated group of Indian Tribes, which included the ancestors of Petitioners. The nature of the communal ownership of the lands August 9, 1814,[4] is fixed by the above treaties. It is not disputed herein that if Petitioners prevail their members will participate in equal moieties in the lands for which they seek an award; if the two Nations prevail Petitioners will participate in equal moieties with them in any award.

Ambiguities are found in both treaties caused by the use of words that are commonly used to convey different meanings supplied by the context.

United States v. *Shoshone Tribe*,[5] syllabi 4, 5, gives two rules applying to the interpretation of Indian treaties, which Petitioners urge are precisely applicable to the circumstances herein:

> "4. Treaties between the United States and Indian tribes are not to be interpreted narrowly, as sometimes as may be writing expressed in words of art employed by words of conveyancers but are to be construed in the sense in which naturally the Indians would understand them."

---

2. 7 Stat. 56; S. App., pp. 8-17.
3. 60 Stat. 1049; S. App., pp. 32-43.
4. 7 Stat. 120; S. App., pp. 22-27.
5. U. S. v. Shoshone Tribe, 304 U. S. 111-118; Jones v. Mehan, 175 U. S. 1 (1899).

"5. In interpreting a treaty between the United States and an Indian tribe, any doubt between the United States and an Indian tribe, any doubt as to the ownership of lands or minerals or timber on lands reserved to the tribe should be resolved in favor of the Indians."

The purpose of interpreting an Indian treaty is not to rewrite the treaty but to arrive at the meaning intended as it would be understood by uncivilized Indians. Herein it applies with equal justice to each of the two groups. No injustice would then be suffered by applying to the United States and the prevailing group or groups the rule given in syllabus 5.

2. Petitioners, Docket No. 172,[6] sue for Just Compensation. The two Nations sue, Docket No. 21,[7] for value at the time the lands were taken. The different character of the suits creates a great conflict of interest when the two suits were consolidated.[8]

The Commission held in its opinion April 22, 1952,[9] Docket No. 21, that the United States admitted that the lands covered by the cession of August 9, 1814, were owned by the Creek Nation and that they approximated some 21,284,800 to 25,936,901 acres. The opinion granted an interlocutory award to the Creek Nation for the lands of the Lower Creeks who were allies of the United States during the time involved herein, but allowed no award for the taking by the cession of lands of the Hostile and Friendly Upper Creeks. The opinion[10] sought to be reviewed held that any award would be distributed to all the living descend-

6. R. Orig. Papers Dk. 172.
7. R. Orig. Papers Dk. 21.
8. R. Orig. Papers Dk. 21.
9. S. App. Pet. for Cert. 49; 2 Ind. Cl. Comm. 98-114.
10. App. Pet. Cert. 19-37.

ants of the Creek Nation as it was constituted August 9, 1814, including Petitioners, in equal moieties. In other words if Petitioners prevail any award to them will be distributed to their members in equal moieties. If the larger group prevail the award will be distributed to the descendants of all the 47 tribes including Petitioners. Because it limited its award to clause 5 of Sec. 2 of the Claim Act, any award to the larger group would not include the lands of the Hostile and Friendly Upper Creeks, but under the holding their descendants would participate in equal moieties in the award. Petitioners are not so limited in Docket No. 172.

Section 2 of The Indian Claims Commission, *supra*, reads in part as follows:

> "Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; * * * (4) claims arising from the taking by the United States, whether as the result of a treaty or cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. * * *"

Petitioners urge under other clauses than 5 of the Indian Claims Act[11] just compensation is allowable for the

11. S. App., pp. 32-43; 60 Stat. 1049.

tortious taking of the lands of the Hostile and Friendly Upper Creeks.

The Act of Congress of June 7, 1862,[12] provided for the collection of a direct tax in insurrectory districts. An attempt was made under this Act to confiscate the Arlington Estate of General Robert E. Lee. In *United States* v. *Lee*[13] the Supreme Court held that the military power was not supreme during war, and the effort to confiscate the 1100 acres of the Arlington Estate was held to be unconstitutional. Mr. Justice MILLER, pages 219, 220, 221, said:

> "What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.
>
> "It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority, except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who *asserts* authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative to deprive any one of life, liberty or property without due process of law, or to take private property without just compensation.
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> • • • • • • • •

12. 12 Stat. 422.
13. 106 U. S. (16 Otto) 196, 27 L. ed. 171.

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights."

The conclusion stated in the above opinion has been stated in many other opinions[14] of this Court.

The applicable part of Section 10 of the Indian Claims Act, *supra,* reads as follows:

"* * * but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless *fraud, collusion* or *laches* on the part of such organization be shown to the satisfaction of the commission." (Emphasis supplied.)

Petitioners filed[15] their suit a few days before limitations would run on filing. It will be noted that in the event Petitioners' suit is not dismissed by this Court and in the event the two Nations prevail, each of Petitioners' members

14. United States v. Creek Nation, 295 U. S. 103, 109, 110 (1934); Lane v. Pueblo of Santa Rosa, 249 U. S. 110, 113 (1918); Cherokee Nation v. Hitchcock, (1902) 187 U. S. 294, 307, 308.

15. Petition R. Orig. Papers, Dk. 172.

would be entitled to just compensation on their moieties in all the lands taken by the cession of August 9, 1814. That no injustice would be suffered by the two Nations.

Petitioners urge that because their suit is for Just Compensation and that of the Creek Nation of Oklahoma is limited to value at the time taken there is a conflict of interest that entitles Petitioners to conduct their own suit with counsel of their own choosing.

It is Hornbook law that one organization and one lawyer cannot represent conflicting interests is at least constructive fraud.

If Petitioners' suit is dismissed, they will lose their right to urge just compensation or communal interest they are admitted to own, whether for the land they claim or for all the land taken by cession of August 9, 1814.

Conclusion.

For the foregoing reasons, Petitioners respectfully pray that the order of this Court denying their Petition for Writ of Certiorari to the Court of Claims be reheard and vacated and that the Petition be granted.

Respectfully submitted,

J. T. SMITH,
Counsel for Petitioners.

Certificate of Counsel.

The undersigned, J. T. Smith, attorney for Petitioners, hereby certifies that the Petition for Rehearing filed in this cause is presented in good faith, that in his judgment said Petition is restricted to the grounds specified in paragraph 2 of Rule 33 as amended, and that said Petition for Rehearing is not interposed for delay.

J. T. SMITH,
Attorney for Petitioners.

Office Supreme Court,
FILED
APR 4 1957
JOHN T. FEY, Clerk

No. 648

In the Supreme Court of the United States

October Term, 1956.

THE YUCHI (EUCHEE) TRIBE OF INDIANS, *ET AL.*,
Below Docket No. 172,
Petitioners,

vs.

THE UNITED STATES OF AMERICA, *Respondent,*
Consolidated below with Docket No. 21.

THE CREEK NATION OF OKLAHOMA, *Respondent,*

vs.

THE UNITED STATES OF AMERICA, *Respondent,*
THE CREEK NATION EAST, *Interpleader.*
Below in Docket No. 21.

MOTION TO RECONSIDER ORDER DENYING PETITION FOR REHEARING.

J. T. SMITH,
222 Berryhill Building,
Sapulpa, Oklahoma,
Counsel for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES,
October Term, 1956.

No. 648

THE YUCHI (EUCHEE) TRIBE OF INDIANS, *ET AL.*,
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vs.

THE UNITED STATES OF AMERICA, *Respondent,*
Consolidated below with Docket No. 21.

THE CREEK NATION OF OKLAHOMA, *Respondent,*

vs.

THE UNITED STATES OF AMERICA, *Respondent,*
CREEK NATION EAST, *Respondent.*
Below in Docket No. 21.

MOTION TO RECONSIDER ORDER DENYING PETITION FOR REHEARING.

To the Honorable Supreme Court of the United States of America:

Come now the above named Petitioners and move this Honorable Court to reconsider its Order of March 25, 1957, herein denying the Petition for a Rehearing, for the following reasons:

1. That should said Petition for a Rehearing be reconsidered by the enlarged Court under its procedure the result might be changed.

2. That the order sought to be reconsidered denies the right of Petitioners to present their claim under the Con-

stitution[1] for moieties of their members in all the lands taken by the Treaty cession of August 9, 1814,[2] before the Indian Claims Commission. If their suit is dismissed this right will be lost to them by limitations. To permit Petitioners to present such claim would in no way lessen or detract from the award made to other Indian groups herein who have limited their right in their Petitions to recover for lands held by the Hostile Upper Creeks.

3. The order sought to be reconsidered denies Petitioners' Constitutional right to recover Just Compensation[3] on their members moieties in all the lands taken by the Treaty cession of August 9, 1814. This would in no way lessen or detract from other Indian groups who cannot recover just compensation because of limitation in their petition.[4]

4. The Petitioners sue for Just Compensation,[5] the two Nations for value at the time the Treaty cession was made. This causes a great conflict of interest between the two suits. To permit one organization to represent such conflicting interests is Petitioners believe without precedent in judicial procedure.

5. Petitioners, many of them full-blood Indians, are approximately 1265 in number. Many of them are too poor to procure proper medicine and medical attention for the aged, or educational advantages for many of the younger generation. The distribution of any award under the opinion sought to be reviewed to members of a Creek Nation

1. United States v. Lee, 106 U. S. (16 Otto) 196, 27 L. ed. 171; United States v. Creek Nation, 295 U. S. 103, 109, 110.
2. 7 Stat. 120, S. App., pp. 22-27.
3. U. S. v. Lee, *supra.*
4. R. Pet. of Cr. No. (orig. papers).
5. R. Pet. of Yuchi (orig. papers).

under Article I of the Treaty, 1790, "* * * all the individuals, towns and tribes of the Upper, Middle and Lower Creeks and Seminoles," based on value at the time taken of the lands of the Lower Creeks would be negligible to grant relief to the individual recipient contemplated by the Indian Claims Act. On the other hand if Petitioners' suit is not dismissed the inclusion of their moieties, which cannot be disputed, in the lands of the Upper Creeks with Just Compensation on the whole would be substantial to the Petitioners' members, and carry out the obvious intent of the Indian Claims Act.

Conclusion.

For the foregoing reasons Petitioners respectfully pray that the orders of this Court denying their Petition for Rehearing and for Writ of Certiorari to the Court of Claims be vacated and the Petitions granted.

Respectfully submitted,

J. T. SMITH,

Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

The undersigned, J. T. Smith, attorney for Petitioners, hereby certifies that this motion is filed in good faith, that in his judgment this motion is in furtherance of substantial justice and is permissible under the rules of this Court, and that said motion is not interposed for delay.

....,

J. T. SMITH,

Attorney for Petitioners.